

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3

4

5

6

----- X  
7 BEECHWOOD RESTORATIVE CARE ) 02-CV-6235(L)  
CENTER, BROOK CHAMBERY AND )  
8 OLIVE CHAMBERY, )  
Plaintiffs )  
9 vs. ) Rochester, New York  
10 LAURA E. LEEDS, SANFORD RUBIN, ) August 20, 2012  
SUSAN T. BAKER, SHARON A. CARLO,) 9:00 a.m.  
11 CYNTHIA T. FRANCIS, )  
Defendants. )  
12 ----- X

13

14

15

16

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAVID G. LARIMER  
UNITED STATES DISTRICT JUDGE

17

18

19

20

21

22

23

24 COURT REPORTER: Christi A. Macri, FAPR, RMR, CRR, CRI  
Kenneth B. Keating Federal Building  
100 State Street  
Rochester, New York 14614-0222  
25

1 A P P E A R A N C E S

2 \* \* \*

3

4 GEIGER & ROTENBERG, LLP  
BY: DAVID ROTENBERG, ESQ.  
5 45 Exchange Boulevard  
Suite 800  
6 Rochester, New York 14614  
- and -  
7 MCCONVILLE CONSIDINE COOMAN & MORIN, P.C.  
BY: KEVIN S. COOMAN, ESQ.  
8 25 East Main Street  
Suite 400  
9 Rochester, New York 14614  
Appearing on behalf of the Plaintiffs

10

11

12

13 ERIC T. SCHNEIDERMAN, ESQ.  
Attorney General of the State of New York  
14 BY: GARY M. LEVINE, ESQ.  
BERNARD SHEEHAN, ESQ.  
15 Assistant Attorneys General  
144 Exchange Boulevard  
16 Suite 200  
Rochester, New York 14614  
17 Appearing on behalf of the Defendants

18

19

20

21

22

23

24

25

1

I N D E X

2

3

Preliminary charge by Judge Larimer	Page	7
Opening statement by Mr. Cooman	Page	14
Opening statement by Mr. Sheehan	Page	33

4

5

6

WITNESS FOR THE PLAINTIFFS

7

Olive Chambery		
Direct Examination by Mr. Cooman	Page	38
Cross-Examination by Mr. Sheehan	Page	41
Brook Chambery		
Direct Examination by Mr. Rothenberg	Page	42
Cross-Examination by Mr. Sheehan	Page	110
Redirect Examination by Mr. Rothenberg	Page	128

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

EXHIBITSPAGE

803 48

806 57

668 61

1                           P R O C E E D I N G S

2                           \*                   \*                   \*

3                           (WHEREUPON, the jury is not present).

4                           THE COURT: Good morning, all.

09:11AM 5                           MR. COOMAN: Good morning, Your Honor.

6                           THE COURT: I guess our jurors have arrived, so we are  
7 pretty much ready to go.

8                           MR. SHEEHAN: Your Honor?

9                           THE COURT: Well, maybe not good morning. Mr. Sheehan?

09:12AM 10                          MR. SHEEHAN: I just had a couple of issues.

11                          THE COURT: Are these things we need to do before we have  
12 our openings?

13                          MR. SHEEHAN: Something you may want to consider about --  
14 you may want to consider polling the jury because there have been  
09:12AM 15 a couple articles in the newspaper, just to make sure they haven't  
16 seen --

17                          THE COURT: I don't know why you wait --

18                          MR. SHEEHAN: I'm sorry.

19                          THE COURT: I don't know why you wait until now to do  
09:12AM 20 that when the jurors are here and we're ready to go.

21                          MR. SHEEHAN: It was something we did before the last  
22 part of the trial. I figured it wasn't going to be that much of  
23 an issue. I apologize, Your Honor.

24                          THE COURT: You didn't think what was going to be an  
09:12AM 25 issue?

1                   MR. SHEEHAN: The polling of the jury. Because we did it  
2 before the beginning of the first six-week part of this trial.

3                   THE COURT: And this relates to what?

4                   MR. SHEEHAN: At least two articles that were in the  
09:13AM 5 *Democrat & Chronicle* concerning proceedings in this case that  
6 contain some of the facts.

7                   THE COURT: Well, I did read the articles. I thought the  
8 facts were all matters that had been presented to the jury. I  
9 don't think there was anything in there that was startling or  
09:13AM 10 unusual or --

11                  MR. SHEEHAN: There was one statement about -- that I  
12 recall, there was a statement of -- that said there had been an  
13 offer of \$8.1 million. I do not believe that the evidence is that  
14 there was an offer.

09:13AM 15                  It certainly hasn't been talked about yet, and it's  
16 definitely an issue in dispute going forward, but --

17                  THE COURT: Well, I'm not sure the article was that  
18 precise. In my review of the experts' reports, my recollection is  
19 there was a letter of intent that was offered about that sum.  
09:13AM 20 Actually, it was seven point some million, but I think the expert  
21 said in terms of equity, it was 8.1 million.

22                  So, I mean, I don't know, but perhaps plaintiffs can  
23 assist me. I assume that may be one of the matters that the  
24 expert will discuss is, in part, something he relied on in coming  
09:14AM 25 to his value estimations?

1                   MR. COOMAN: That's correct, Your Honor. I don't think  
2 we see any need to poll the jury on this.

3                   THE COURT: Yeah, I mean, I did review the articles. I  
4 think there was one that sort of related perhaps to some of the  
09:14AM 5 motion arguments, but I didn't think there was anything in there  
6 (A) that the jurors hadn't already heard or that they're about to  
7 hear. So I see no need to poll the jury.

8                   MR. SHEEHAN: Thank you, Your Honor.

9                   THE COURT: Anything else?

09:15AM 10                  MR. SHEEHAN: Not at this time, Your Honor.

11                  THE COURT: All right. And are you going to make the  
12 openings, Mr. Sheehan?

13                  MR. SHEEHAN: Yes, I am, Your Honor.

14                  THE COURT: Who is for the plaintiffs?

09:15AM 15                  MR. COOMAN: I'm doing the opening, Your Honor.

16                  THE COURT: Okay. I have a few things to say just to  
17 kind of segue as to where we've been and where we are, and then I  
18 guess we're ready for the openings.

19                  I guess Mr. Cooman could go first.

09:15AM 20                  MR. COOMAN: Correct.

21                  THE COURT: I think you both told me you had 20 minutes  
22 or so-ish?

23                  MR. COOMAN: 26 minutes and 20 seconds, Your Honor, if I  
24 pause in the right spots.

09:15AM 25                  THE COURT: 26.

1                   Mr. Sheehan, are you about the same?

2                   MR. SHEEHAN: No, Your Honor. I'm more like 10 or 12  
3 minutes, Your Honor.

4                   THE COURT: Okay, that's fine. Then I guess we have two  
09:15AM 5 witnesses today, Mr. Chambery and Mrs. Chambery?

6                   MR. COOMAN: Correct.

7                   THE COURT: Not in that order?

8                   MR. COOMAN: Correct.

9                   THE COURT: All right, let's bring in our jurors and have  
09:15AM 10 them in their proper seats. I don't see any of them, so I inquire  
11 as to whether either side were going to use charts in the  
12 openings?

13                  MR. COOMAN: I am not, Your Honor.

14                  MR. SHEEHAN: No, Your Honor.

09:16AM 15                  THE COURT: Okay.

16                  (WHEREUPON, the jury is present).

17                  THE COURT: Familiar faces, one and all. Good morning,  
18 ladies and gentlemen again. I hope you had a pleasant break.

19                  Let me say a few things about our present proceedings in  
09:18AM 20 this case. In a word, this case involves your determination about  
21 what damages plaintiff, plaintiffs are entitled to recover based  
22 on your verdict of June 26th.

23                  That certain defendants -- Laura Leeds, Sanford Rubin,  
24 Sue Baker, Sharon Carlo and Cynthia Francis -- did retaliate  
09:19AM 25 against the plaintiffs for Brook Chambery's exercising his rights

1 under the First Amendment. You made that determination  
2 unanimously after about seven weeks of testimony, argument of  
3 counsel, and after considering the Court's instructions to you on  
4 the elements necessary to prove a civil rights violation. That  
09:19AM 5 is, that Mr. Chambery's rights were violated for his legitimate  
6 exercise of his First Amendment rights.

7 This trial has been what's called a "bifurcated" trial.  
8 That means it was divided in half. That is, we tried the issue of  
9 liability or fault first. And now since you found liability and  
09:19AM 10 fault, you are now required to consider in this second phase of  
11 the trial based on the evidence that will be presented to you what  
12 fair and reasonable damages should be for the violation of  
13 plaintiffs' constitutional rights.

14 Many trials are not bifurcated. They go from beginning  
09:20AM 15 to end, but some are separated for a variety of reasons. Those  
16 reasons are of no concern of yours.

17 When I discussed this case with you back in May and  
18 June, and certainly just before you began your deliberations, I  
19 described the elements of a civil rights case or the elements of  
09:20AM 20 this particular civil rights violation, and I'm recapping here  
21 just to kind of bring us all back up to speed, as it were.

22 The first element -- and I guess I would say what we're  
23 dealing with today and in the next couple of days is sort of the  
24 last element that a plaintiff has to establish by a preponderance  
09:21AM 25 of the evidence, that is, damages.

1           So just reviewing, the first element that plaintiff had  
2 to prove was that he engaged in speech and/or acts that were  
3 protected by the First Amendment. In other words, that  
4 Mr. Chambery engaged in protected speech under the First  
09:21AM 5 Amendment.

6           As I'm sure you recall, you heard much evidence  
7 concerning the complaints, the letters, the use of the informal  
8 dispute or IDR process by Mr. Chambery.

9           And as I recall in the closing arguments of counsel,  
09:21AM 10 there really wasn't much dispute that Mr. Chambery did engage in  
11 protected First Amendment activity.

12           The second element that plaintiff in any civil rights  
13 case has to establish is that the defendants acted under color of  
14 state law. That is, that they were acting pursuant to the  
09:22AM 15 authority given to them as state officials.

16           In this case, there was no dispute that the acts of the  
17 defendants were in their official capacities. They were not  
18 acting as private citizens.

19           Next, the plaintiff was required to show that the  
09:22AM 20 defendants took some adverse action against them or him for  
21 engaging in protected speech. The defendants must have taken some  
22 adverse action, that is, adverse to plaintiff and Beechwood.

23           And it was undisputed that the defendants, as members of  
24 the Department of Health, sought and ultimately succeeded in  
09:22AM 25 obtaining the revocation of Beechwood's operating certificate

1 which prevented Beechwood from continuing to operate. Without  
2 such an operating certificate, one may not operate in the State of  
3 New York.

4 Beechwood closed in the summer of 1999. I think the  
09:23AM 5 pertinent date you'll probably hear more testimony about, which is  
6 July 17, 1999.

7 The final element that you considered back in May and  
8 June was whether Mr. Chambery's protected speech was a substantial  
9 or motivating factor in the defendants' decision to take adverse  
09:23AM 10 action against him.

11 If plaintiff's free speech and the exercise of his  
12 rights under the First Amendment played a substantial or  
13 motivating part in the defendants' decision, then plaintiff would  
14 have made out his case.

09:23AM 15 And by your verdict of June 26th, you found that  
16 plaintiffs had proven all the elements that I've just recited to  
17 you by a preponderance of the evidence.

18 Now we get to the issue at hand today. Had we tried  
19 this case in one sitting, the fifth or the final element would  
09:23AM 20 have been damages. It's now incumbent upon you to consider  
21 whether Mr. Chambery has suffered damages and the extent of those  
22 losses and damages.

23 Losses and damages that were proximately caused by the  
24 defendants' unconstitutional retaliatory acts. You'll hear much  
09:24AM 25 more from me, and perhaps by the lawyers later as to this concept

1 of proximate cause. We're not retrying this case. I just  
2 recounted, I guess, where we've been over the past six and a half  
3 or seven weeks.

4                   We are focusing on the fifth and final element of  
09:24AM 5 plaintiffs' lawsuit, that is, the allegation that Mr. Chambery has  
6 made that he and Beechwood suffered damages because of the acts of  
7 the defendants essentially related to the closing of the business.

8                   Plaintiff has the burden on this element as he did with  
9 the other elements, that is, he must establish by a preponderance  
09:25AM 10 of the evidence that it's more likely than not that he suffered  
11 the injuries that he complains of, and that the defendants'  
12 retaliatory conduct, which you've already found, was the proximate  
13 cause of the loss and the damages sustained.

14                  In other words, as I will explain to you in more detail  
09:25AM 15 as we proceed, the plaintiff must establish that the impermissible  
16 acts, if you will, were a substantial factor in causing the damage  
17 complained of. It must be a factor. May not be the only factor,  
18 and I'll instruct you more on this aspect as we hear the proof and  
19 at the conclusion of the case.

09:26AM 20                  What we're going to do first this morning is the lawyers  
21 are going to present an opening statement to you about this part  
22 of the case. That is, they're going to advise you what they  
23 expect the proof to be over the next couple of days.

24                  I think today we will only have two witnesses that will  
09:26AM 25 be presented to you. The proof here, I expect, will involve both

1 economic losses and non-economic losses. I suspect plaintiff in  
2 his opening, and I believe Mr. Cooman will present the opening  
3 this morning, may well list the types of damages that they seek to  
4 recover. There's four or five different types of damages, I  
09:26AM 5 believe, which the plaintiffs claim were proximately caused by the  
6 unconstitutional acts that you found of the defendants.

7 I anticipate that you'll hear from Mr. Chambery, his  
8 mother Olive, and a principal in the business called "forensic  
9 economics," who will testify, I believe tomorrow, and present to  
09:27AM 10 you his opinion about the lost value, business value, of the  
11 business that was closed.

12 You'll also hear witnesses presented by the defendants  
13 from a CPA and perhaps another witness giving their opinion as to  
14 the market value of the business and the loss suffered by  
09:27AM 15 Beechwood.

16 I think we've talked a little bit about expert witnesses  
17 in the first phase of the trial. Expert witnesses are individuals  
18 who by virtue of experience, training and education in some  
19 particular field are allowed to come in and give opinions to you.  
09:28AM 20 That's something a lay witness is not ordinarily allowed to do,  
21 that is, give opinions.

22 But these experts have extensive experience in terms of  
23 evaluating businesses, and they will present testimony to you and  
24 at the end of the day it's up to you to decide, like you do any  
09:28AM 25 witness, what weight to give to the testimony of these witnesses.

1           I will instruct you further on things you can consider  
2 in evaluating the experts' testimony. I don't think I'm giving  
3 away any secrets here by telling you that witnesses testifying for  
4 the plaintiff as to the lost value is, I expect, will be many  
09:29AM 5 times higher than the value that the defendants' expert places on  
6 the business.

7           It will be up to you to carefully consider the testimony  
8 given, the circumstances under which it's given, the basis for the  
9 experts coming to the conclusions they do -- or they will make and  
09:29AM 10 render your verdict.

11           It's not uncommon that in various types of cases there  
12 is expert testimony presented about a variety of things. We have  
13 medical experts that come in all the time; in patent cases experts  
14 come in and talk about pretty sophisticated machines and so forth.

09:29AM 15           Jurors have to carefully listen and make judgments based  
16 on the testimony presented, and assisted by the arguments of the  
17 lawyers as to what they think is helpful and important to you.

18           You have note pads. Some of you used them pretty  
19 extensively during the liability phase. Certainly you may use  
09:30AM 20 notebooks in the damage phase. I guess when the experts come to  
21 testify they will be talking numbers. So if you're disposed to  
22 use note pads and things that might be a time to do it.

23           Of course, all the testimony is taken down carefully by  
24 Ms. Macri, so that if any time in your deliberations you need some  
09:30AM 25 testimony read back, we can certainly consider that.

1           I suspect there will also be documentary evidence  
2 presented to you like there was in the last trial. Certainly not  
3 as much or as many exhibits as before. There may be some charts  
4 that the experts may use to assist in their presentation to you.

09:30AM 5           At the end of the day or the end of the case you'll have  
6 a verdict sheet. It might be a little longer than the one you  
7 used back in June, and I suspect it will have lines for you, blank  
8 lines, to put in should you find damages to have been proven, each  
9 particular type of damage. And we will certainly discuss the  
09:31AM 10 verdict form when we get to that phase of the case.

11           After we've heard all the proof, the Court will give you  
12 its final instructions on the law, which I hope will -- not only  
13 hope, but it's expected will guide you in the deliberations and  
14 present the law to you on the entire aspect of damages, what's  
09:31AM 15 required, who has the burden, things you may consider and so  
16 forth.

17           So that concludes my opening remarks. This is sort of a  
18 mini-trial, but it's really just part of the first trial and I am  
19 allowing counsel to make openings. We will have proof; at the end  
09:32AM 20 of that the lawyers will make closings; and I'll give you my  
21 charge and then you'll deliberate.

22           So without further adieu, I believe we're ready for  
23 Mr. Cooman, your opening. You may present your opening remarks to  
24 our ladies and gentlemen of the jury.

09:32AM 25           MR. COOMAN: May it please the Court, welcome back,

1 ladies and gentlemen, and thank you for your willingness to give  
2 us another few days of your valuable summertime to complete your  
3 responsibilities as --

4 THE COURT: They had no choice, but they did so  
09:32AM 5 graciously.

6 MR. COOMAN: They did, indeed. I guess justice is not  
7 yet complete.

8 If you break something, you have to pay for it. This is  
9 one of the basic principles of responsible behavior that we learn  
09:32AM 10 from the time that we are children. A parent takes us into a gift  
11 shop where beautiful merchandise is displayed and they say to us,  
12 "Be careful. If you break something, you have to pay for it."

13 And that is what this phase of the trial is all about.  
14 Because the defendants broke things, valuable things, important  
09:33AM 15 things, irreplaceable things, that belonged to Beechwood and the  
16 Chamberys, a 45-year-old family business, a pioneer business, a  
17 woman's heart and emotions, an entrepreneur's career, and a  
18 family's hard earned reputation and good name.

19 Since the defendants would not, will not and cannot  
09:33AM 20 restore or replace what they broke, they have to pay for it.

21 So your main responsibility during this phase of the  
22 trial is to give to Beechwood and to Olive and to Brook complete  
23 justice by valuing those things that were broken by the  
24 defendants.

09:33AM 25 And it's not as simple as the gift shop breakage,

1 because there you simply look at the price tag that's on the  
2 bottom of the broken thing and that's what's owed. Rather here in  
3 this case, each item that was broken by the defendants has got to  
4 be valued in a little different way.

09:34AM 5                 How was it that the defendants went about breaking  
6 things? We spent six and a half weeks together revealing the  
7 pieces of the Department of Health offensive and how each of those  
8 pieces was crafted together not really to fix or correct issues at  
9 Beechwood, but as you determined by your verdict, to retaliate  
09:34AM 10 against Brook and Beechwood.

11                 And the defendants, because of their positions and the  
12 unrestrained arbitrary power that they had, were able to put  
13 together that offensive and to mobilize the weapons necessary to  
14 accomplish it.

09:34AM 15                 You recall that they resurrected unsubstantiated  
16 complaints to kick off what became an abuse of the typical survey  
17 and enforcement process.

18                 You recall from the secret e-mails between Ms. Leeds and  
19 Mr. Rubin that if Beechwood's Medicare and Medicaid funding were  
09:35AM 20 curtailed, the Chamberys might try to survive in the business with  
21 their substantial private pay resident business.

22                 They developed a piece of the offensive to deal with  
23 that, and that plan was panic the private pay residents and the  
24 potential residents and the insurance companies with adverse  
09:35AM 25 publicity. They ordered their Public Affairs Group to issue press

1 releases and website bulletins like Exhibit 37. They made sure  
2 that the newspaper headlines and the 6 o'clock news screamed that  
3 Beechwood was a bad place and the Chamberys were terrible  
4 operators.

09:35AM 5 Then the defendants announced to the world that their  
6 intention was to do what they had never done before, let alone to  
7 a financially stable and quality nursing home, revoke the  
8 operating license in their own hearing in order to accomplish and  
9 ensure not just a temporary funding suspension, but a permanent  
09:36AM 10 closure of the facility.

11 So what were the intended consequences that the proof  
12 will show of the defendants' retaliation? The Chamberys were  
13 publicly humiliated, Beechwood was put out of business, all done  
14 to crush Brook and his mother financially so that they could never  
09:36AM 15 survive economically to ever come to court to bring this to light.

16 And so it happened. Each of the defendants took their  
17 actions, made their recommendations, got the Medicare and Medicaid  
18 funding cut off, revoked the operating license, and then the final  
19 crushing blow: The Chamberys were told that there would be no sale  
09:36AM 20 of the business. It wouldn't be approved unless Brook and Olive  
21 put up the white flag of surrender, released all the defendants  
22 that are sitting over at that table from all their misdeeds, a  
23 release that would have given up the plaintiffs' right to come to  
24 court and to prove their case.

09:37AM 25 After the Chamberys' operating certificate was revoked,

1 they were told that the Department of Health was then taking the  
2 position that even the Certificate of Need was gone, too. That  
3 now the Chamberys only had bricks and mortar to sell.

4 Well, in reality, as you will hear, not even sell.

09:37AM 5 Rather, the building was foreclosed, boarded up, still boarded up  
6 unoccupied.

7 MR. SHEEHAN: Your Honor, objection. May we approach?

8 (WHEREUPON, a discussion was held at side bar out of the  
9 hearing of the jury.)

09:37AM 10 MR. SHEEHAN: Your Honor, I'm objecting because it seems  
11 like we're getting into argument here. Based on everything we've  
12 already heard, admittedly, I was going --

13 THE COURT: What?

14 MR. SHEEHAN: -- I was going to go back and talk about  
09:38AM 15 some of what happened before, but not like this.

16 THE COURT: I don't think it's gotten into argument yet.  
17 Counsel, both counsel, need to keep in mind it is opening  
18 statements and present what you expect to prove. So be careful,  
19 both of you, as to that.

09:38AM 20 (WHEREUPON, side bar discussion concluded.)

21 THE COURT: You may continue --

22 MR. COOMAN: Thank you, Your Honor.

23 THE COURT: -- with the Court's direction.

24 MR. COOMAN: A valuable community resource was lost that  
09:38AM 25 was an anchor of a city neighborhood with constant activity,

1 employment, and visitors. And so now it is time for the  
2 defendants to pay up.

3 You, as jurors, get to finish the job you started and  
4 determine the value of each of those losses that the plaintiffs  
09:39AM 5 suffered. Let me tell you what the evidence you will hear will  
6 show about each of those things the defendants broke and how you  
7 will go about determining the value of each of those items.

8 Your first task is to essentially put on your business  
9 person or investor's hat and determine a reasonable value for the  
09:39AM 10 Beechwood business as of 1999 based on the profitability of that  
11 business prior to the Department of Health offensive.

12 Mr. Chambery, Mr. Rothenberg and I retained a firm whose  
13 every day job is to value businesses, Forensic Economics,  
14 established by Rochester Business -- University of Rochester  
09:39AM 15 Business School professors located right here in Rochester.

16 James Canessa, who is a forensic economist with many  
17 years of experience, in doing this task of valuing, which he is  
18 going to be here and will describe for you the methodology that he  
19 used to determine what Beechwood was worth in the summer of 1999  
09:40AM 20 using the actual audited financial statements of Beechwood.

21 The proof will show that the quality, reputation and the  
22 innovations at Beechwood had enabled the partnership to become a  
23 very profitable business.

24 That is the financial incentive we have in the American  
09:40AM 25 economy for those with the best ideas and who are able to

1 implement them, create jobs, at the same time provide for  
2 consumers something that we want.

3 So in Brook's case he is the entrepreneur who was in the  
4 forefront of the healthcare industry, much like Henry Ford making  
09:40AM 5 cars, or George Eastman creating photography, or Steve Jobs  
6 creating the iPad, Mr. Chambery created electronic medical records  
7 for nursing homes, how to implement them and how to deliver  
8 cutting edge quality care in skilled nursing homes.

9 You will learn that Olive and Brook shared the business  
09:41AM 10 profits with their employees through a salary scale that was by  
11 far the best in the area, and a performance bonus program that was  
12 unheard of. That is one of the ways that they encouraged and  
13 rewarded and ensured quality care.

14 Then you'll hear from Mr. Canessa and from Brook the  
09:41AM 15 profit of the Beechwood business was comprised of two items:  
16 Family salaries; plus the bottom line earnings of the partnership  
17 after payment of the expenses.

18 For the calender year 1998, the year before the  
19 Department of Health bomb went off, the profit of the Beechwood  
09:41AM 20 business was \$1.6 million. Canessa's job and your job is  
21 essentially saying if a business -- if an investment produces  
22 \$1.6 million a year in profit, what is that investment worth?  
23 Where would an investor go and what amount of money would you have  
24 to invest in order to get an annual return of \$1.6 million?

09:42AM 25 To answer that question, an evaluation expert looks at

1 several different ways of valuing the business, but the primary  
2 proper tool to use is what's called a "discounted cash flow  
3 analysis." A DCF analysis of the actual Beechwood business, not  
4 some other nursing home business or other healthcare business of a  
09:42AM 5 very different size or another state.

6 Mr. Canessa will explain to you the DCF methodology,  
7 what it involves. In simplest terms, here's what you will hear:  
8 You take the annual revenue of Beechwood, you subtract the expense  
9 of the business, things like salary and wages to staff other than  
09:42AM 10 family members, equipment costs, the mortgage and the rent,  
11 utilities, the insurance, all the expenses, and then the  
12 difference between the revenue and the expenses was Beechwood's  
13 profit and establishes a profit margin.

14 Any business that's producing a profit has a value, and  
09:43AM 15 the value of the business is commensurate with the amount of the  
16 profit of that particular business.

17 The more profitable the business is, the higher its  
18 value. This is very logical and understandable. Mr. Canessa will  
19 tell you because if you're going to buy a business, one of the  
09:43AM 20 first questions you want to know in order to decide how much  
21 you're willing to pay for that business is how much can I make if  
22 I own this business?

23 Mr. Canessa will tell you that the middle of the value  
24 range that he calculated for Beechwood was \$17.8 million. In  
09:43AM 25 arriving at that number he made several conservative choices to

1 guard against an overvaluation of the facility. And given  
2 Beechwood's preeminent position in healthcare, the value could  
3 well have been higher.

4                 After you've heard all the evidence, we will ask you to  
09:44AM 5 determine that the lost value of Beechwood in 1999 was a very  
6 substantial figure, and not less than the \$17.8 million.

7                 The second component of damages that you will need to  
8 determine is this: The non-economic personal loss to Olive  
9 Chambery. Mrs. Chambery did not suffer any broken bones when the  
09:44AM 10 defendants destroyed Beechwood. But the kind of pain she did  
11 experience was worse than if she had: The defendants ruined her  
12 life's work.

13                 This had been a classic American success story. The  
14 evidence you have heard showed their hard work, tremendous  
09:45AM 15 financial risk, dedication to serving others, and insistence on  
16 high standards and doing a good job, all resulting in a business  
17 that had a sterling reputation. And it was a place to work that  
18 attracted and paid the very best people as employees and treated  
19 those employees just like the residents: As if they were family  
09:45AM 20 members.

21                 In 1999 Mrs. Chambery was 73 years old. As many seniors  
22 now do, she still enjoyed going into work and overseeing aspects  
23 of the Beechwood business. She was officially still the  
24 administrator and watched with pride as Brook took the facility to  
09:45AM 25 even higher levels of quality and community recognition.

1           But then instead of happily stepping into her true  
2 retirement years with satisfaction, she watched in horror as the  
3 regulators systematically destroyed everything that she and Herb  
4 had created from scratch and created so hard to build.

09:46AM 5           I'm going to have Mrs. Chambery take a few minutes later  
6 this morning to tell what you she felt and experienced during  
7 those terrible months of 1999 and thereafter. She will describe  
8 for you what the law calls "emotional distress," a special kind of  
9 pain and suffering.

09:46AM 10          And your responsibility will be to simply use your good  
11 common sense and principles of justice to place a monetary value  
12 on what Olive Chambery experienced.

13           A third component of the plaintiffs' damages for you to  
14 determine is Brook's lost wages as a result of the defendants  
09:46AM 15 taking away his job and taking away his ability and any realistic  
16 opportunity he had to obtain employment in healthcare in the years  
17 after the offensive.

18           In the several years before the closure of the facility,  
19 Brook took a salary from Beechwood as an employee. It was a  
09:47AM 20 substantial salary, several hundred thousand dollars a year.  
21 Because this was a family owned business, Brook's salary was  
22 largely comprised of the business profits taken home in the form  
23 of salary.

24           So in this case, you will hear Brook's damages for lost  
09:47AM 25 income are not the profit portion of his salary since that's

1 already figured in to the business value, but rather a more  
2 typical nursing home administrator's salary for someone who is not  
3 a family member owner of that business.

4                   Mr. Canessa is going to explain to you his research and  
09:47AM 5 his conclusion that the figure to use for Brook's lost wage  
6 computation should be a minimum of \$125,000 a year trended forward  
7 over the years with an inflation factor. And the math on that  
8 works out to be about \$2 million over the 13 years from 1999  
9 through 2012.

09:48AM 10                 "Too bad" the defendants are going to tell you. Their  
11 evidence and claim is that you should not award any lost income to  
12 Brook because he did not take another job and should have. The  
13 defendants' defense is a peculiar one in view of the evidence that  
14 you have heard and will hear since it was the defendants' actions  
09:48AM 15 which prevented Brook from ever working in healthcare in New York  
16 State, which is all he had ever done from the time that he was a  
17 teenager.

18                 Indeed, the evidence that you have heard and will hear  
19 is that that was the very goal of the offensive: Get rid of Brook  
09:48AM 20 from healthcare.

21                 So since the defendants have raised this as a defense,  
22 we need to show you what Brook has had to do for the last 13 years  
23 since 1999 as a result of the defendants' actions against him.  
24 Brook spent all of his time during what should have been the most  
09:49AM 25 productive and rewarding years of his career working on cleaning

1 up and then seeking justice for the devastation that the  
2 defendants had created for Beechwood and its employees and for  
3 Brook's own career.

4                 He was occupied more than full time with non-income  
09:49AM 5 earning responsibilities. He only took four weeks of vacation  
6 over those 13 years. It was only because of the past success of  
7 the Beechwood business, his careful savings and the fortuity Brook  
8 and his brother had sold the Beechwood Software business in 1998  
9 that Brook was in a position to undertake those unpaid  
09:50AM 10 responsibilities and still maintain his family.

11                 Brook's unpaid labor can be summarized in three  
12 categories. First, from 1999 through 2002, he had full  
13 responsibility for systematically wrapping up the Beechwood  
14 business. The defendants would not allow it to be sold, so it had  
09:50AM 15 to be wrapped up. You can't just close the door and walk away  
16 when you've been running a multi-million dollar healthcare  
17 business in New York.

18                 All the suppliers had to be paid, and they were in full.  
19 He kept a skeleton crew of six or eight people to help with the  
09:50AM 20 process, a couple of them staying on through the end of the year,  
21 late in 2000. And by then his brother Dale came alongside and  
22 continued to help Brook all the way through this lawsuit.

23                 All the post-employment concerns for the employees had  
24 to be taken care of: Benefits, retirement and insurance plans,  
09:51AM 25 employment verifications to new employers. And instead of just

1 abandoning the building, Brook in a responsible manner closed it  
2 up and put it in a condition for any new owner who might obtain it  
3 in a foreclosure.

4                  Every piece of equipment and supply had to be  
09:51AM 5 inventoried and then sold as salvage. Years of medical records  
6 had to be organized, filed, preserved for future access. Normal  
7 cost reports to the State were completed and audits by various  
8 government agencies and the insurers had to be handled.

9                  And then during those same years and for the next few  
09:51AM 10 years Brook had to deal with the defense and prosecution of  
11 closure-related proceedings, responses to the Medicaid Fraud  
12 Control Unit subpoenas and the three year long criminal  
13 investigation.

14                  That investigation that not only exonerated Beechwood  
09:52AM 15 and Brook, but pronounced the care at Beechwood to have been very  
16 good to excellent and found that Beechwood's staffing levels were  
17 above even those of the proposed federal guidelines for nursing  
18 homes.

19                  And, finally, over the ensuing years Brook's time was  
09:52AM 20 spent preparing and supporting the prosecution of this case until  
21 we were finally able to get it to trial. Brook was determined  
22 that the defendants would not get away with what they had done to  
23 the careers of the Beechwood employees who had served so well and  
24 to his own career and livelihood.

09:52AM 25                  So Brook, working with his brother Dale and with

1 counsel, painstakingly discovered and put together the pieces of  
2 proof that have allowed us to reconstruct the activities of the  
3 defendants in 1998 and 1999.

4                 This involved repeated Freedom of Information requests  
09:52AM 5 to the government agencies, the litigation in state court all the  
6 way to the New York Court of Appeals to obtain the documents, then  
7 there was the review and the indexing and the cataloguing of all  
8 those thousands of pages of documents that had been forcibly  
9 obtained from the Department of Health, the federal government and  
09:53AM 10 the MFCU.

11                 He spent innumerable hours over the years just in the  
12 preparation of key spreadsheets that contained 9,000 lines,  
13 300,000 cells filling multiple computer screens detailing each and  
14 every action of each defendant and the other people who had been  
09:53AM 15 involved in the events of this case.

16                 This was a Herculean task. In other circumstances it  
17 might have been accomplished by an army of young lawyers and  
18 paralegals had Beechwood been able to hire such an army. But  
19 Beechwood could not afford to do that, so Brook did.

09:53AM 20                 Full justice requires that Brook be compensated by the  
21 defendants for this very real economic loss of a paycheck in his  
22 chosen field.

23                 Fourth and finally, what is the smearing of a good name  
24 and reputation worth? Brook's loss in this regard was no less  
09:54AM 25 than his mother's, though it came with different impacts because

1 of the stage of his career that he was at when this hit. You  
2 heard during phase one of the trial that Brook had taken a very  
3 good family business and made it into one of the premier nursing  
4 homes in the state.

09:54AM 5 You'll hear more particular details about that in this  
6 phase of the trial. People wanted to go to Beechwood, Beechwood's  
7 quality statistics were among the very best in the state and  
8 continuing to rise. Brook had found ways to deliver quality care  
9 efficiently by utilizing those EMR's before others, including the  
09:54AM 10 regulators, even understood their value or how to use them.

11 And he had solidified the Beechwood name in the  
12 forefront of the rehabilitation business that you will learn  
13 mushroomed regionally and across the state in the following years.

14 Under Brook's inspirational leadership, Beechwood had  
09:55AM 15 driven down the cost of rehab, shortened stays, gotten people home  
16 happier and healthier.

17 The Chamberys had assembled a talented team of leaders  
18 and staff: Paul Kesselring, Donna Richardson, Gwen Westbrook just  
19 to name a few of those dedicated 100, all committed to the same  
09:55AM 20 vision: To be simply the best and fully intending to make  
21 Beechwood their careers until that was derailed by the deliberate  
22 actions of the defendants.

23 As healthcare consumers we needed Brook in New York, but  
24 having been deprived of his visionary ideas for healthcare  
09:56AM 25 delivery, as we seek to figure out the statewide and national

1 challenges --

2 THE COURT: Mr. Cooman, don't get too much into argument  
3 here. Don't get into argument at all.

4 MR. COOMAN: Very well, Your Honor.

09:56AM 5 THE COURT: That's for a later date.

6 MR. COOMAN: What might the care have looked like in New  
7 York State had Brook been able to continue? Think of that deal  
8 with Preferred Care in June of 1999.

9 Brook's healthcare career in a matter of weeks in the  
09:56AM 10 spring of 1999 was ended. He was 49 years old. He is now 62.  
11 Brook and Peg's son Nathan and their daughter Lea were 12 and 6 in  
12 1999. While they grew up, graduated high school, went off to  
13 college and grad school, Brook labored to expose the offensive and  
14 the destruction that it caused.

09:56AM 15 It's pretty tough to lose those 13 years of your life,  
16 to see people have to change careers, to see valued long-term  
17 colleagues and employees forced to find new jobs or to find a  
18 place to work that was as financially or personally rewarding as  
19 Beechwood had been.

09:57AM 20 Brook spent his entire career in healthcare in the  
21 skilled nursing home family business. The defendants had very  
22 publicly and intentionally ruined his reputation and the Chambery  
23 name. What possible similar job could he have found and been  
24 hired for?

09:57AM 25 After what the defendants did, you will learn Brook was

1 not going to be able to design and sell any more EMR systems. He  
2 was not going to be invited to be a guest speaker any more to talk  
3 about the implementation of the EMR's. He was not invited to  
4 share his insights into the way that healthcare reform should take  
5 place.

6           What do you suppose people came up with when people  
7 Googled Brook Chambery or Beechwood after the adverse media  
8 campaign that you will hear the defendants conducted?

9           At the close of the case later this week we will ask you  
09:58AM 10 to fairly and adequately compensate Brook in what Judge Larimer  
11 will tell you are called "general compensatory damages" for the  
12 injury to his reputation, and the other non-economic losses that  
13 he experienced.

14           Your assessment of the credibility of witnesses, you  
09:58AM 15 will hear, will be an important consideration, as it was during  
16 the first phase of the trial, since the defendants dispute the  
17 plaintiffs' claims of damages.

18           During the first phase of the trial the defendants asked  
19 you to consider two things: They told you that every one of the  
09:58AM 20 defendants did not retaliate against Beechwood and the Chamberys,  
21 despite what their own memos and e-mails said.

22           And then as a fallback, the defendants told you that  
23 even if they did retaliate, it didn't matter because they would  
24 have done the same thing anyway.

09:59AM 25           In this part of the trial the defendants are, once

1 again, claiming two things that they would ask you to believe.  
2 First, that they did not cause the damages to Beechwood, that it  
3 was someone else's fault, like HCFA or Commissioner Novello or  
4 Brook himself.

09:59AM 5 And, second, if they did cause the damage, that  
6 Beechwood's claim of value is too high.

7 As to the first point, the defendants, the proof will  
8 show, did cause the damage as the evidence you've heard and seen  
9 confirms. It was Baker and Francis' trumped up surveys and false  
09:59AM 10 memos to Central Office at HCFA; it was Baker and Leeds'  
11 recommendation for early termination to HCFA; it was Carlo and  
12 Baker's announcement of the Medicaid and Medicare termination to  
13 the Chamberys and then to the residents; and it was the press  
14 releases to the media, the legislators and to the public that was  
10:00AM 15 arranged by Leeds and Rubin.

16 It was Leeds and Rubin who, as they confirmed in their  
17 e-mails, got HCFA to back us all the way and to initiate that  
18 in-house Department of Health proceeding against Beechwood to  
19 revoke the operating license about which there was no doubt as to  
10:00AM 20 the outcome.

21 And can we possibly forget the defendants' explicit  
22 celebratory e-mails about taking Beechwood down? The chickens are  
23 coming home to roost, amen and hallelujah, hot diggity dawg.

24 On the second point related to valuation, consider  
10:00AM 25 carefully what the defendants' witnesses will tell you was the

1 value of the Beechwood business. Consider whether the value for  
2 the business the defense witnesses suggest to you aligns at all  
3 with the facts of what you will hear Beechwood, not some other  
4 facility, actually was.

10:01AM 5 Listen carefully as to how the defense witnesses  
6 calculate their number. Consider what they took into account and  
7 what they decided to ignore. Ask yourself whether the number they  
8 suggest to you is a reasonable value for a business that was  
9 producing \$1.6 million in annual owner profits.

10:01AM 10 Later this week after a couple of witnesses,  
11 Mr. Rothenberg will be back to summarize for you the proof about  
12 plaintiffs' damages and to discuss with you the verdict sheet that  
13 Judge Larimer will have prepared for you on which to give your  
14 answers.

10:01AM 15 We simply ask based on the evidence that you hear, not  
16 for some outlandish figures, but rather just for adequate, fair  
17 and reasonable compensation for Beechwood and the Chamberys  
18 consistent with the magnitude of the damage and losses that  
19 they've suffered.

10:02AM 20 And remember that basic principle of responsibility and  
21 a just outcome: If you break it, you have to pay for it.

22 Thank you very much for your attention and for your  
23 service.

24 THE COURT: Thank you.

10:02AM 25 Mr. Sheehan, I understand you will be making the opening

1 statement for the defendants. If you're ready, you may proceed.

2 MR. SHEEHAN: Thank you, Your Honor.

3 May it please the Court, ladies and gentlemen of the  
4 jury, good morning.

10:02AM 5 My name is Bernie Sheehan. I've been sitting at that  
6 table for the first six weeks while Gary Levine was trying this.  
7 I'm also an Assistant Attorney General for the New York State  
8 Office of Attorney General.

9 During those first six weeks you heard Mr. Levine  
10 present evidence about Beechwood and about the care and the  
11 conditions at Beechwood, and you saw that the care there was not  
12 up to par and that there were deficiencies and violations.

13 I'm not going to redo all that testimony. But some of  
14 what you heard then is relevant now to your consideration of  
15 damages.

16 For example, the state administrative law judge Mark  
17 Zylberberg, his Report and Recommendation that was Exhibit 1000  
18 that you heard a lot about the first time. I'm not going to go  
19 through it again, but there were findings and deficiencies in that  
20 report that are binding on you.

21 You heard Judge Larimer indicate the Findings of Fact,  
22 the deficiencies, the violations that the administrative law judge  
23 Zylberberg true -- are to be taken as true.

24 We know there were residents who needed care, but didn't  
10:04AM 25 get it. We know there were residents who needed medication and

1 pain medicine, but didn't get it. People suffered, people were  
2 put at risk.

3                 But there were no corrections. Mr. Chambery and  
4 Beechwood didn't correct. Despite the lapses in care --

10:04AM 5                 THE COURT: Mr. Sheehan, we're not retrying that part of  
6 the case. We're focusing only on damages, the jury having  
7 returned the verdict that they have. So I think you're best to  
8 focus on that.

9                 MR. SHEEHAN: Yes, Your Honor. And because of that, the  
10 federal agency HCFA terminated Beechwood, and that happened in  
11 June of 1999 and Beechwood closed in July of 1999 because of it.

12                 You heard Mr. Chambery testify that they could not  
13 survive without Medicare payments, so they had to close if there  
14 was no Medicare paying for the treatment at Beechwood.

10:05AM 15                 You saw that they had the chance to correct. You saw  
16 Mr. Chambery could have hired a consultant. And even as  
17 Mr. Cooman (sic) testified, there was plenty of money to do so.  
18 He could have easily afforded a consultant, but they chose not to.  
19 They chose not to address the problems. They chose instead to  
20 fight and contest the problems.

21                 Even though you heard that's exactly what other  
22 facilities did, other facilities would hire a consultant when they  
23 were dealing with the short timeframe that Mr. Cooman was  
24 describing earlier.

10:05AM 25                 It's the defendants' position that -- the reason I'm

1 telling you all this is because it's defendants' position that  
2 just because there was retaliation does not necessarily mean  
3 Mr. Chambery's entitled to damages if he didn't take  
4 responsibility for his actions, which is something that we --  
10:05AM 5 that's something that we've been arguing all along.

6 However, having said that, it's my job to deal with  
7 plaintiffs' arguments concerning damages. I have to present  
8 evidence to deal with their arguments about the value of Beechwood  
9 and the damages that they're claiming.

10:06AM 10 And so you're going to hear from Ms. Maureen Rutecki and  
11 Mr. James Canessa. They're sitting behind us in the first row.

12 Ms. Rutecki, someone who has a lot of experience in  
13 valuing businesses; she's even valued several nursing homes.  
14 Mr. Marasco has a lot of experience doing economic analysis and  
10:06AM 15 assessing damages, just like we're going to hear about from the  
16 plaintiffs, from their expert, from Mr. Canessa.

17 You're going to see that Ms. Rutecki and Mr. Marasco's  
18 value for Beechwood is fair market value. Something -- it's a  
19 price that someone would actually purchase Beechwood for as  
10:06AM 20 opposed to what you'll hear from Mr. Canessa.

21 It's a price that's based on price per bed and common  
22 sense. Plaintiffs' expert did not do this. Plaintiffs' expert,  
23 as Mr. Cooman intimated, will give you a much, much higher value.  
24 A value three or four times higher than what we would expect  
10:07AM 25 actually to pay for Beechwood.

1           Ms. Rutecki will show you by comparing Beechwood to  
2 other facilities and transactions of other facilities similar to  
3 Beechwood, same age, same size, that you get a value that's more  
4 in line with what Ms. Rutecki will say.

10:07AM 5           You're going to hear about some complicated methods to  
6 calculate a value for Beechwood from all the experts. Valuing of  
7 business is a complicated thing.

8           Ms. Rutecki will testify that she examined Beechwood's  
9 financial data and the actual sales of other nursing facilities to  
10 generate her value, and then she applied several different methods  
11 to confirm that value. And that at each step Ms. Rutecki asked  
12 herself, does this make sense?

13           You'll hear from Mr. Marasco. He'll testify as to the  
14 overall methodology, the way Ms. Rutecki looked at the value and  
15 the way the plaintiffs' expert Mr. Canessa looked at damages.

16           He's going to testify that a lot of that doesn't make  
17 sense, the way they value Beechwood doesn't make sense. In  
18 particular, you'll hear about some of the categories that they're  
19 going to testify to, including the lost wages, that they don't  
20 make sense.

21           Mr. Cooman mentioned 1998, and that 1998 was a banner  
22 year for Beechwood, that the profits there were greater. 1998 was  
23 an anomaly, and there's reason to believe, as the proof will show,  
24 that profits would not continue that way. For example, they had  
25 not taken into account violations and the deficiencies; there were

1 changes that would have needed to have been made to address that  
2 going forward, especially as the entire facility was moved to  
3 rehabilitation instead of long-term residential care.

4 At the end of this trial, after you've heard a few days  
10:09AM 5 of testimony from, I think, about five witnesses, I'm going to be  
6 up here again and I'm going to ask you to award the plaintiffs \$1  
7 because they had the chance to avoid all this, they had the chance  
8 to hire a consultant and avoid all these problems, but they chose  
9 not to.

10:09AM 10 Thank you.

11 THE COURT: Thank you. Ladies and gentlemen, I think  
12 before we begin the proof I'll let you take our first break this  
13 morning. The jury can step outside before we have our witness.

14 (WHEREUPON, the jury was excused).

10:10AM 15 THE COURT: Ten or 15 minutes.

16 (WHEREUPON, there was a pause in the proceeding.)

17 THE COURT: We're ready for the witness and our jury?

18 MR. COOMAN: We are, Your Honor.

19 THE COURT: Bring in the jurors and start with

10:35AM 20 Mrs. Chambery.

21 (WHEREUPON, the jury is present).

22 THE COURT: Mr. Cooman, you may call your witness.

23 MR. COOMAN: Thank you, Your Honor. We call Olive  
24 Chambery.

10:36AM 25

1                   PLAINTIFFS' WITNESS, OLIVE CHAMBERY, SWORN

2                   DIRECT EXAMINATION

3                   THE COURT: Thank you. You can have a seat there for us.

4 Watch your step as you climb into the witness chair.

10:38AM 5                   Mrs. Chambery, hello. How are you?

6                   THE WITNESS: Okay, thank you.

7                   THE COURT: Try to keep your voice up so that all the  
8 jurors and the parties in court can hear what you have to say,  
9 okay?

10:38AM 10                  THE WITNESS: All right.

11                  THE COURT: That sounds good.

12                  Mr. Cooman?

13                  MR. COOMAN: Thank you, Your Honor.

14 BY MR. COOMAN:

10:38AM 15 Q. Mrs. Chambery, at the time that the Department of Health took  
16 action against Beechwood, were you still active at the business?

17 A. Yes, I was.

18 Q. What were your first thoughts when the Department of Health  
19 started to make the claims that they did about Beechwood?

20 A. My first thoughts were just, I guess, I was just surprised,  
21 devastated. What can they be doing to us? We've been running  
22 such an excellent place. We've always had -- when they would do a  
23 survey, it always turned out wonderful.

24 Q. Did you believe that the claims the Department of Health was  
10:39AM 25 making were true?

1 A. No, I didn't.

2 Q. Were you concerned at all about the residents at Beechwood  
3 having to move?

4 A. Oh, I just felt awful because we -- it was like a home for  
10:39AM 5 them and they were taken into our facility to help them.

6 Q. What fears did you have as these things started to happen?

7 A. I was just --

8 THE COURT: Fears for the patients or --

9 MR. COOMAN: Her personal fears.

10:39AM 10 THE WITNESS: My personal fears?

11 BY MR. COOMAN:

12 Q. Right.

13 A. I just -- I just thought what was going to happen to us? How  
14 could they do this? My fear was just what's going to happen to me  
10:40AM 15 after all these years?

16 Q. Were you embarrassed at all by what was being said about  
17 Beechwood?

18 A. Oh, yes, because we had such a good reputation up until then.

19 Q. Did you curtail your activities at all as a result of what  
10:40AM 20 happened?

21 A. Oh, yes. I didn't want to go out into public. I didn't -- I  
22 didn't -- I didn't want to sign my name somewhere because people  
23 would see Chambery, and I even -- I was always very active in  
24 church and church activities, and I didn't want to do it.

10:40AM 25 Q. Why didn't you want to do it?

1 A. Because of my name. They thought Chambery was -- we run such  
2 an awful place, we could have hurt patients.

3 Q. How did the actions that the defendants were taking affect  
4 you physically?

10:41AM 5 A. Physically, I don't know if depleted is a good word, but I  
6 was just -- it just took me over so that I just felt -- I felt  
7 very weak. And my health, I thought what is going to happen to me  
8 with my health? I just -- I couldn't seem to accept it. I didn't  
9 know what to do.

10:41AM 10 Q. After these things began to happen, what did you think and  
11 feel when you saw the American flag?

12 A. Oh, I just -- I could never even look at it. This is  
13 America, this is where --

14 MR. SHEEHAN: Your Honor, objection.

10:41AM 15 THE COURT: Overruled.

16 BY MR. COOMAN:

17 Q. You may go ahead.

18 A. Oh, when I looked -- I looked at the flag, I thought this is  
19 happening here in America where you have freedom of speech and  
10:42AM 20 that somebody could do something to me like this, to us.

21 Q. Were you able to get over any of these hurts and feelings  
22 that you were experiencing?

23 A. Well, slowly on, but it took a few years. Even now when I  
24 think about it, it still bothers me that this could have happened.

10:42AM 25 Q. In what way did this whole experience change you?

1 A. It changed my physical being, it changed my actions, it  
2 changed -- that I just didn't -- I didn't feel that I could do  
3 things like I did.

4 It just -- I was -- even physically, I just -- I felt  
10:43AM 5 not strong anymore. That it was just -- I don't know, it just --  
6 it had me -- it had me just so devastated. It just...

7 MR. COOMAN: That's all the questions I have. Thank you.

8 Mr. Sheehan may have a few.

9 THE WITNESS: All right.

10:43AM 10 CROSS-EXAMINATION

11 BY MR. SHEEHAN:

12 Q. Good morning, Mrs. Chambery.

13 A. Good morning.

14 Q. I just have a couple of questions. How old were you when  
10:43AM 15 Beechwood closed?

16 A. In 1999?

17 Q. Yes, ma'am.

18 A. That was six years -- well, 12 years. How old was I? 78?  
19 75.

10:44AM 20 Q. Were you 75?

21 A. I think so.

22 Q. Okay.

23 MR. SHEEHAN: No further questions, Your Honor. Thank  
24 you.

10:44AM 25 THE COURT: Thank you.

1 MR. COOMAN: That's all. Thank you, Mrs. Chambery, you  
2 may go back to your seat.

3 THE COURT: Watch your step.

4 (WHEREUPON, the witness was excused).

10:44AM 5 MR. ROTHENBERG: Your Honor, the plaintiffs call Brook  
6 Chambery.

7 THE COURT: Brook Chambery.

8 MR. ROTHENBERG: In the meantime, are we working here?

9 THE CLERK: Yes.

10:45AM 10 PLAINTIFFS' WITNESS, BROOK CHAMBERY, SWORN

11 DIRECT EXAMINATION

12 THE COURT: Have a seat there for us.

13 MR. ROTHENBERG: Ready to go, Your Honor?

14 THE COURT: Yes, thank you. You may proceed.

10:45AM 15 MR. ROTHENBERG: Thank you.

16 BY MR. ROTHENBERG:

17 Q. Good morning, Mr. Chambery.

18 A. Good morning.

19 Q. I want to begin by backing up to 1993 when you assumed the  
10:46AM 20 leadership of Beechwood. And when exactly did that occur?

21 A. After my father's death in March of 1993.

22 Q. Okay. And as of that date, was the computerized medical  
23 records system operational -- strike that.

24 Was the software system for the books and records, was  
10:46AM 25 that operational at Beechwood?

1 A. Yes, it was fully networked.

2 Q. Okay. And how about the computerized medical records system,  
3 was that operational at Beechwood?

4 A. I'm sorry, I thought that's what I --

10:46AM 5 Q. Well, my first question was just about the, you know, the  
6 books and records, the financial piece of the software.

7 A. Oh, yeah, that had been up for many years.

8 Q. Okay. And the computerized medical records, was that up and  
9 running in March of 1993?

10:47AM 10 A. Yes, in a fully networked environment.

11 Q. What do you mean by "fully networked" again?

12 A. Multiple stations or multiple computers at the  
13 nurses' stations, as well as through the facility.

14 Q. Okay. And I don't want to repeat all of this again, but what  
15 were the benefits of the computerized medical records system?

16 A. Well, in short, it would -- it allowed people to have their  
17 hands-on information a lot faster than they would otherwise, which  
18 increased teamwork.

19 That, in turn, led to quality improvements. That led to  
20 a lot shorter time that the nurses had to spend or all the staff  
21 had to spend doing their paperwork, which then allowed them to  
22 have more time in their patient care activities.

23 Q. In March of 1993 was Beechwood still a long-term care  
24 facility?

10:48AM 25 A. Yes, it was.

1 Q. Were there any rehabilitation beds in the facility in March  
2 of 1993?

3 A. No.

4 Q. Okay, let's move forward to the end of 1998. What was the  
10:48AM 5 size -- strike that.

6 Was Beechwood in the rehab business at the end of 1998?

7 A. Yes, it was.

8 Q. And what was the size of the rehab unit at Beechwood as of  
9 the end of 1998?

10:48AM 10 A. By the end of 1998 we had 40 beds dedicated -- or 41 beds  
11 actually dedicated to rehab; and the size of our program put us in  
12 the top 5% in the state.

13 Q. And when you say "size," how do you measure size there?

14 A. Measure size by the number of people going home or to local  
10:48AM 15 care, discharges going through that unit.

16 Q. Okay. So the number of discharges measured what over the  
17 course of a year or a month or how did you measure it?

18 A. Well, over the course of the year. We had the statistics to  
19 show that.

20:49AM 20 Q. Okay. And what was the state ranking -- I'm sorry, not the  
21 number, but what did you just say?

22 A. The top 5%. I think we were number 19 in the state.

23 Q. Okay. And at that time Beechwood was independent, correct?

24 A. Correct.

20:49AM 25 Q. Were you owned and operated by any big hospital facility?

1 A. No, we weren't.

2 Q. Were there some rehab units that were, in fact, owned and  
3 operated by hospital systems?

4 A. Yes.

10:49AM 5 Q. And even -- did this rank that you just described, did that  
6 compare Beechwood to all rehab units, even the ones that were  
7 owned and operated by hospital systems?

8 A. Yes.

9 Q. Okay, let's focus then on some trends during the years 1993  
10 to 1998 under your leadership. And what happened in terms of the  
11 size of Beechwood's rehab unit during that period of time?

12 A. Well, we started implementing the rehab unit or the rehab  
13 program probably late 1993 into 1994. And it just gradually grew  
14 until 1998, we had the full unit going.

10:50AM 15 Q. Okay. Now, during this same timeframe under your leadership,  
16 did Beechwood begin implementing performance bonuses for its  
17 employees?

18 A. Yes, I did.

19 Q. Had there all -- strike that.

10:51AM 20 Had there previously been a program for end of year or  
21 Christmas bonuses?

22 A. There was historically a Christmas bonus, yes.

23 Q. Okay. Did something new or different happen under your  
24 leadership?

10:51AM 25 A. Well, first of all, I started increasing those Christmas

1 bonuses, but eventually I split it out and made it performance and  
2 a Christmas bonus.

3 Q. Okay. And --

4 A. I believe that was around 1996.

10:51AM 5 Q. Did Beechwood pay its employees a performance bonus in  
6 calender year 1998?

7 A. Yes, it did.

8 Q. Do you know what the size of that was in terms of percentage  
9 of pay or anything like that?

10:51AM 10 A. The total bonuses were approximately \$200,000, which came to  
11 about 11 and a half, 11.6 percent of pay.

12 Q. And what part of that was the performance bonus, either in  
13 raw dollars or in percentage?

14 A. \$172,000 was the performance bonus.

10:52AM 15 Q. Okay. Did Beechwood implement any other dollars and cents  
16 benefits for its employees under your leadership?

17 A. I started a 401(k) program for them. I think that was in  
18 1994 and 1995.

19 Q. And a 401(k) program is a form of a retirement program?

10:52AM 20 A. Their retirement plans, and we contributed to that.

21 Q. "We" being who?

22 A. The nursing home.

23 Q. Now, as Beechwood moved from long-term care into the rehab  
24 care, did Beechwood's expenses increase or decrease or remain the  
25 same?

1 A. Well, as you're doing rehab, your expenses are going to  
2 increase.

3 Q. Okay. Throughout the 1990's, particularly in the years under  
4 your leadership, Mr. Chambery, what change, if any, occurred in  
10:53AM 5 Beechwood's annual revenues?

6 A. They went up accordingly. The rates for rehab are higher  
7 than just ordinary nursing home care.

8 Q. I'm going to show you a exhibit, an exhibit, excuse me. I'd  
9 like to show it to Mr. Chambery first. Okay, thank you.

10:53AM 10 THE CLERK: Hold on a second.

11 BY MR. ROTHENBERG:

12 Q. Do you have Exhibit 803 on your screen there?

13 A. Not quite yet.

14 Q. No? We don't have it. It's my fault.

10:54AM 15 Now do you have it on your screen?

16 A. Yes, I do.

17 Q. Okay, sorry about that. What's 803?

18 A. 803 is a bar chart showing revenues from 1980 to 1998.

19 Q. And there are some other numbers on there. There's some  
10:54AM 20 numbers on those diagonal lines. Don't tell me what the numbers  
21 are, but what do those numbers show?

22 A. Showing the rate of growth over those years.

23 Q. Okay. And does Exhibit 803 fairly and accurately describe the  
24 annual revenue for Beechwood Restorative Care in the years 1980  
10:55AM 25 through 1998?

1 A. Yes, those were taken off of our financial statements.

2 Q. Okay.

3 MR. ROTHENBERG: Offer Exhibit 803, Your Honor.

4 MR. SHEEHAN: No objection, Your Honor.

10:55AM 5 THE COURT: Without objection, 803 is received and may be  
6 published to the jury if you wish.

7 (WHEREUPON, Exhibit 803 was received into evidence).

8 BY MR. ROTHENBERG:

9 Q. Just to go over this again since the jury wasn't seeing it  
10 the first time you talked about it, there's a bar for each year  
11 1980 through 1998, correct?

12 A. Yes.

13 Q. And at the top of the bar there's a number, right?

14 A. Yes.

10:55AM 15 Q. Okay. What does that number represent with respect to each  
16 year?

17 A. That number represents gross revenue.

18 Q. So that's not profit, that's just the total amount of revenue  
19 that Beechwood received, correct?

10:56AM 20 A. Correct.

21 Q. Okay. Now, let's focus on the period of 1993 to 1998, which  
22 would be the right-hand side of the chart. Do you see that?

23 A. Yes, I do.

24 Q. And does Exhibit 803 indicate what was the average annual  
10:56AM 25 growth in revenue for Beechwood under your leadership?

1 A. 9.3% a year.

2 Q. Now, you were affiliated with Beechwood for many, many years  
3 before 1993 when your father passed away, correct?

4 A. Yes, I was. From 1972 on.

10:56AM 5 Q. You were employed from 1972 on after college, correct?

6 A. Correct.

7 THE COURT: Could I just interrupt? On the chart there's  
8 a abbreviation CAGR.

9 MR. ROTHENBERG: I'm sorry. Sure, I'll go over all of  
10:57AM 10 that stuff. Let's do that.

11 BY MR. ROTHENBERG:

12 Q. First of all, you testified there was 9.3% growth under your  
13 leadership. There's another line that says 1980 to 1998, and then  
14 there's the number 7.1%, correct?

10:57AM 15 A. Yes.

16 Q. And what does that represent?

17 A. That represents the growth rate from 1980 to 1998.

18 Q. By the way, what does CAGR mean exactly?

19 A. I can only guess. Continuing advancement and gross revenue.

10:58AM 20 Q. And in the little box there, there is two other numbers. Do  
21 you see those numbers?

22 A. Yes.

23 Q. And one is an inflation number and one is the nominal GDP; is  
24 that correct?

10:58AM 25 A. Yes, gross domestic product.

1 Q. Did you actually figure those numbers out or did Mr. Canessa,  
2 to your knowledge, figure those numbers out?

3 A. Mr. Canessa did that.

4 Q. Okay, so we'll straighten that out with Mr. Canessa.

10:58AM 5 And, I'm sorry, Judge, that's why I skipped over those  
6 other numbers.

7 So let's go back. You worked at Beechwood from 1972 to  
8 1999, correct?

9 A. Yes.

10:58AM 10 Q. And do you recall during your entire tenure at Beechwood,  
11 Mr. Chambery, do you recall was there ever a time when the gross  
12 revenues declined from one year to the next?

13 A. I don't recall it, no.

14 Q. And according to Exhibit 803, was there ever an occasion  
10:59AM 15 between 1980 and 1998 when the gross revenues declined from one  
16 year to the next?

17 A. No.

18 Q. So we just all watched the Olympics and everybody was talking  
19 about records during the Olympics. I'm guessing you watched the  
10:59AM 20 Olympics. Did you watch the Olympics?

21 A. Yeah, a little bit.

22 Q. Is it fair to say that Beechwood set a record for earnings  
23 every single year from 1980 through 1998?

24 A. Yes.

10:59AM 25 Q. For revenues rather? Record for revenues?

1 A. Record for revenues, yes.

2 Q. Now, the pace of growth, did the pace of growth change once  
3 you transitioned into the rehab business?

4 A. Yes, it did. From that average of 7.1 to 9.3%.

11:00AM 5 Q. Now, I want to talk to you about a different number, I want  
6 to talk to you about the profit margin number. And, first of all,  
7 do you understand what the term means, "profit margin"?

8 A. Yes.

9 Q. And what's it mean?

11:00AM 10 A. Difference between gross revenues and expenses.

11 Q. Isn't profit margin --

12 A. That would be the profit if -- the margin would be the  
13 percentage.

14 Q. All right, all right. So just in general, so let's do that  
11:00AM 15 again. In general terms, "profit" means what?

16 A. Profit is the difference in the gross revenues minus  
17 expenses.

18 Q. Okay. And the "profit margin" then is?

19 A. Profit divided by gross revenues would give you the margin.

11:00AM 20 Q. And that's expressed as a percentage, is it not?

21 A. Correct.

22 Q. So I would like to show you another exhibit. May we turn  
23 this off for the jury, please?

24 I'm going to show you what is marked as Exhibit 806. Do  
11:01AM 25 you have 806 on your screen?

1 A. Yes, I do.

2 Q. Okay. And just without telling us its content, this is  
3 another bar chart, correct?

4 A. Yes.

11:01AM 5 Q. And what does it depict?

6 A. It is labeled adjusted profit margins. So it is depicting  
7 the profit margins as calculated from 1998 to -- from 1989, I'm  
8 sorry, to 1998.

9 Q. Okay. And does that include the entire period under your  
11:01AM 10 leadership?

11 A. Yes.

12 Q. And some bars are gray and some bars are green, correct?

13 A. Yes.

14 Q. And do you know what the difference in gray and green is on  
11:02AM 15 this chart?

16 A. Yes, it's labeled as rehabilitation, but it's also got a box  
17 next to that that describes it as also due to where I took over  
18 management.

19 Q. To your knowledge, Mr. Chambery, are the profit margins  
11:02AM 20 reflected on Exhibit 806 -- strike that. I'll rephrase that.

21 Does 806, to your knowledge, fairly and accurately  
22 reflect the profit margins at Beechwood during the years 1989  
23 through 1998?

24 MR. SHEEHAN: Objection, Your Honor. Exhibit 806 refers  
11:02AM 25 to adjusted profit margins.

1                   THE COURT: I'm sorry, I didn't hear you.

2                   MR. SHEEHAN: Exhibit 806 refers to adjusted profit  
3 margins.

4                   THE COURT: All right. Well, is that a fair difference?

11:03AM 5 Can you answer that question? Does it show adjusted profit  
6 margins?

7                   THE WITNESS: I was about to explain that. Yes, this is  
8 called adjusted profit margins, but it is not taking into account  
9 all the revenue that the nursing home had.

11:03AM 10                  MR. ROTHENBERG: Hold on a second, we'll get to that in  
11 one second.

12 BY MR. ROTHENBERG:

13 Q. When it says "adjusted profit margins," do you know what the  
14 essential adjustment is that's reflected on this exhibit?

11:03AM 15 A. This exhibit would reflect revenues minus some -- the typical  
16 things that we would have every year, what we would call  
17 "retroactive revenues."

18 Q. Here, let me do this a different way. You have a -- there's  
19 reference on Exhibit 806 to a term called EBITDA, E-B-I-T-D-A,  
20 which is the thing that accountants talk about all the time?

21 A. Yes.

22 Q. Do you know what EBITDA stands for?

23 A. Yes, earnings before interest, taxes, depreciation and  
24 amortization.

11:04AM 25 Q. Okay. If you looked at Beechwood's -- strike that.

1           To get to Exhibit 806, do you know whether there was any  
2 sum that was added to the EBITDA on Beechwood's financial  
3 statements to reach the margins that are reflected on 806?

4 A.     In order to get to the EBITDA, the forensic economist that  
11:04AM 5 prepared this chart would have to add back in to the bottom line  
6 of the, you know, the facility, the profits, would have to add  
7 back in depreciation, amortization, any taxes and --

8 Q.     How about family salaries?

9 A.     And family salaries.

11:05AM 10 Q.     Okay. And so the --

11 A.     So this figure would be typically greater than the reported  
12 profits. But to make it easier on everybody, this is the typical  
13 way operations are compared on a financial basis. So we just kind  
14 of wrap it into what we call "profits."

11:05AM 15 Q.     Okay. So with that understanding, to your knowledge,  
16 Mr. Chambery, does Exhibit 806 fairly and accurately reflect the  
17 adjusted profit margins for Beechwood in the years 1989 through  
18 1998?

19           MR. SHEEHAN: Objection, Your Honor, foundation. He  
11:05AM 20 didn't prepare the chart.

21           THE COURT: Could you speak a little louder?

22           MR. SHEEHAN: I'm sorry, Your Honor. Objection,  
23 foundation. He didn't prepare the chart.

24           THE COURT: Well --

11:06AM 25           MR. ROTHENBERG: He doesn't have to.

1                   THE COURT: Doesn't mean he can't answer it. Have you  
2 reviewed the material upon which this chart was made and --

3                   THE WITNESS: Yes, I did.

4                   THE COURT: -- does it accurately reflect the adjusted  
11:06AM 5 profit margins for the years in question?

6                   THE WITNESS: Yes, with an exception that when it was  
7 prepared, the consultant or the expert witness that did this left  
8 out a sizeable chunk of revenue every year because he didn't  
9 consider it operating revenue for that year.

11:06AM 10 BY MR. ROTHENBERG:

11 Q. Are you talking -- well, what kind of revenue are you talking  
12 about there?

13 A. Well, for instance, every year after doing Medicaid and  
14 Medicare cost reports, which are done after the annual statements,  
11:06AM 15 there may be adjustments that the third-party payors owe us. And  
16 so that may come in in the next year, but it's really due to the  
17 year before.

18                   If that was -- and when this chart was prepared, they're  
19 leaving out those revenues every year.

20 11:07AM Q. By leaving them out, did they make the profit margins bigger  
21 or smaller?

22 A. They made the profit margins smaller.

23 Q. Okay. Now, assuming that we're going to disregard those kind  
24 of revenues there, but in terms of the annual revenues each year,  
11:07AM 25 does 806 fairly and accurately depict the adjusted profit margins

1 for Beechwood in those years?

2 A. Yes.

3 THE COURT: Are these the profit margins before the  
4 interest, taxes, depreciation, amortization were --

11:07AM 5 THE WITNESS: No, that's after. That's all added back in  
6 to the -- what would be the financial statement bottom line.

7 You have family salaries, you take the audited financial  
8 statements, you add back in the family salaries, you add back in  
9 the depreciation, amortization, interest and you come to this  
11:08AM 10 figure.

11 THE COURT: You say "add back in." You subtract it from  
12 the revenues?

13 THE WITNESS: Yeah. Well, those are subtracted from the  
14 revenues to begin with to get your net profits. So now we add  
11:08AM 15 them back in to get earnings before those items.

16 So these figures here are going to be greater than what  
17 would show on a financial statement except for the retroactive  
18 revenues that are collected every year. He didn't include those  
19 here.

11:08AM 20 THE COURT: Well, I assume we're going to have another  
21 witness that's going to talk about this?

22 MR. ROTHENBERG: Yes, we are, Your Honor.

23 THE COURT: Are you moving this?

24 MR. ROTHENBERG: I am, Your Honor.

11:08AM 25 THE COURT: Okay. Any objection?

1                   MR. SHEEHAN: Your Honor, we do object just because we  
2 don't think there was a sufficient foundation. We think  
3 Mr. Canessa, who prepared this document, would be the better  
4 witness to offer it because of the calculations.

11:09AM 5                   THE COURT: Well, I think this witness has sufficiently  
6 indicated he's familiar with the figures, although he did not make  
7 the chart. I think it's sufficiently identified and authenticated  
8 to allow it to be received. I do understand we probably will  
9 have another witness who will testify further about it.

11:09AM 10                  So I'll receive 806.

11                   (WHEREUPON, Exhibit 806 was received into evidence).

12                  MR. ROTHENBERG: Thank you. We need Ms. Rand to publish  
13 it, Your Honor.

14                  THE COURT: What do you want?

11:09AM 15                  MR. ROTHENBERG: We need to publish it to the jury. I  
16 said we need Ms. Rand, but maybe I was presumptuous. I guess we  
17 don't need Ms. Rand. Thank you, Your Honor.

18                  THE COURT: We need Ms. Rand. Sometimes an old judge can  
19 figure it out.

11:09AM 20 BY MR. ROTHENBERG:

21 Q. Okay. So you have 806 in front of you?

22 A. Yes, I do.

23 Q. All right. And I just want to focus on the last couple years  
24 there. The margin that's depicted here for 1997, the profit  
11:10AM 25 margin was what?

1 A. For 1997 it was 23.4%.

2 Q. And for 1999 the profit margin was what?

3 A. For 1998?

4 Q. Excuse me, 1998. The profit margin?

11:10AM 5 A. 29.9%.

6 Q. And there are some ups and downs as we proceed from left to  
7 right, correct?

8 A. Yes.

9 Q. But in general, from left to right, what is the trend,  
11:10AM 10 Mr. Chambery?

11 A. Upward.

12 Q. And in terms of rehab vs. the long-term care, were the profit  
13 margins greater or less when you were doing the rehab business?

14 A. Well, the profit margins were greater. I would not attribute  
11:11AM 15 that all to rehab. That's due to efficiencies that I put -- I  
16 instituted in the facility.

17 Q. Okay, fair enough. And let's just spend one more second on  
18 this retroactive revenue. The retroactive revenue appears on  
19 Beechwood's financial statements I take it, correct?

11:11AM 20 A. Yes.

21 Q. But when Exhibit 806 was prepared, was retroactive revenue  
22 counted in figuring out what the profit margin was for each year?

23 A. No. If it had been, 1997 would have been about 5% higher.

24 Q. Okay. Where did Beechwood's profit margins stack up in terms  
11:11AM 25 of other facilities in New York State in 1998?

1 A. Two and a half times higher.

2 MR. SHEEHAN: Objection, foundation.

3 MR. ROTHENBERG: Okay, I'll rephrase.

4 BY MR. ROTHENBERG:

11:12AM 5 Q. Are you familiar with statistics that are maintained by any  
6 government body regarding the profit margin at facilities  
7 throughout New York State?

8 A. Yes, I am.

9 Q. And have you reviewed those statistics -- let's focus on  
11:12AM 10 1998. Have you reviewed those statistics for 1998?

11 A. Yes, I have.

12 Q. Okay. And based on your review of those statistics, where did  
13 Beechwood profit margins stack up in terms of all the facilities  
14 in New York State?

11:12AM 15 MR. SHEEHAN: Objection, Your Honor. Is there a  
16 document? I'm not sure exactly what -- I'm not sure what  
17 Mr. Chambery's referring to and so I don't know if the foundation  
18 has been laid.

19 THE COURT: Well, do you want to question him, *voir dire*  
11:12AM 20 here as to the basis for his knowledge?

21 MR. ROTHENBERG: Well, here, maybe I can answer this for  
22 Mr. Sheehan. Let's do it a different way.

23 BY MR. ROTHENBERG:

24 Q. I need to turn the screen off for the jurors, Your Honor.

11:14AM 25 I'm showing you what we've marked as Exhibit 668. Do

1 you have 668 in front of you?

2 A. Yes, I do.

3 Q. And what is 668?

4 A. That 668 represents data that came from New York State cost  
11:14AM 5 reports.

6 Q. And is this data that's maintained by -- when you say "New  
7 York State," who maintains this data?

8 A. The Department of Health does. Annually the facilities turn  
9 in cost reports, and that is compiled by the Department of Health  
11:14AM 10 and we filed under the Freedom of Information for that data and we  
11 compiled the EBITDA for all the facilities in the state.

12 Q. And at the bottom of this page it says 1 of 14; is that  
13 correct, Mr. Chambery?

14 A. Correct.

11:15AM 15 Q. And is the entire table, in fact, 14 pages long?

16 A. Yes.

17 Q. Okay. But this particular exhibit is what portion of that  
18 table?

19 A. The first page.

11:15AM 20 Q. Okay. And does this contain statistical data maintained by  
21 the State of New York regarding financial information relating to  
22 skilled nursing facilities throughout the State of New York in  
23 1998?

24 A. Yes.

11:15AM 25 MR. ROTHENBERG: Okay. So I'm going to offer 668, Your

1 Honor.

2 MR. SHEEHAN: Your Honor, what's the -- we object on the  
3 grounds of relevance. What's the relevance of this document?

4 THE COURT: Well, I think the witness was testifying  
11:16AM 5 about profit margins and where Beechwood fit in the scheme of  
6 things, so --

7 MR. ROTHENBERG: Exactly, Your Honor.

8 THE COURT: If that's the objection, I'll overrule it and  
9 receive the exhibit principally for that purpose --

11:16AM 10 MR. ROTHENBERG: Thank you.

11 THE COURT: -- alone.

12 MR. ROTHENBERG: Thank you, Your Honor.

13 (WHEREUPON, Exhibit 668 was received into evidence).

14 MR. ROTHENBERG: Can we publish 668 to the jury?

11:16AM 15 BY MR. ROTHENBERG:

16 Q. So is there a column on here that's profit margins?

17 A. Yes, it's labeled adjusted EBITDA.

18 Q. Well, adjusted EBITDA, that's --

19 A. I'm sorry, the dollars are there; and then the margins are  
11:16AM 20 over on the most -- on the right-hand side.

21 Q. Yeah. Be not the far right column, but the second from the  
22 right, correct?

23 A. The far right gives you the ranking of those margins.

24 Q. Okay. And so this shows Beechwood ranking at what number?

11:17AM 25 A. Number 23.

1 Q. Okay. And this is only one page though. Do you know that's  
2 23 out of how many?

3 A. 23 out of -- at the top of the report it says 571 facilities.

4 Q. Oh, I see. That's under facility number?

11:17AM 5 A. Correct.

6 Q. Let's do this, if I could remember how to do this stuff. So  
7 how many facilities again?

8 A. That were used for this report, which means they had valid  
9 data, that's all that were on the -- oftentimes facilities don't  
11:17AM 10 turn in cost reports on time or whatever. At the point in time we  
11 got this data, there were 571 facilities on it.

12 Q. Okay. And Beechwood was 23rd out of 571 in terms of profit  
13 margin for 1998; is that correct?

14 A. Correct.

11:18AM 15 Q. Now, do you know of your own knowledge, Mr. Chambery, how  
16 Beechwood's private pay rates related to the statewide average for  
17 private pay rates in 1998?

18 A. The private pay rates were less than average.

19 Q. Beechwood's private pay rates were less than average?

11:18AM 20 A. Correct.

21 Q. And how about Medicaid reimbursement rates? Not Medicare,  
22 but Medicaid. Was Beechwood's Medicaid reimbursement rate  
23 average, below average, above average in 1998?

24 A. Lower than average.

11:18AM 25 Q. Let's talk about Medicare reimbursement in 1998. How was

1 Medicare reimbursement determined in 1998?

2 A. In 1998 we were under a prospective payment system with  
3 Medicare, which meant there was a projected -- or they set the  
4 rates in advance, and we got paid per day based on patients'  
11:19AM 5 assessment categories, how much they're -- how much nursing they  
6 needed.

7 Q. Okay, hang on. Let's break this apart. Is the prospective  
8 pay system, is that sometimes called the PPS system?

9 A. Yes.

10 Q. When you say you got paid, how -- was the reimbursement rate  
11 at Beechwood the same as other facilities or different from other  
12 facilities?

13 A. The same.

14 Q. Now, as between different patients, as between Mr. Smith and  
11:19AM 15 Mrs. Jones, would the reimbursement rate necessarily be exactly  
16 the same?

17 A. No. That would be dependent on their nursing needs, their --  
18 and their therapy needs principally.

19 Q. You used the term "assessment." And kind of sort of in lay  
11:20AM 20 terms, what's that mean? Some of us know what it means, but tell  
21 everybody else what it means.

22 A. Medicare set up an assessment, how many hours of nursing  
23 care, how many hours of PT or OT that a patient needed in a day or  
24 in a week. And there were about 32 categories alone in nursing --  
11:20AM 25 categories of patients with various nursing and therapy needs.

1 Q. Okay. And so the patient, they would figure out which  
2 category Mrs. Jones or Mr. Smith fit in and then you would get  
3 reimbursed based on that category?

4 A. Correct. The nurses and the therapists had to do assessments  
11:20AM 5 of those patients.

6 Q. And if a patient was in that category, is it true that they  
7 would get the same reimbursement no matter what facility in the  
8 state they were at?

9 A. By 1998, yes.

10 Q. Okay. Now, talking again about Medicare, though, what was  
11 going on with the length -- strike that.

12 Are rehab patients compensated by private pay?

13 Medicare? How are rehab patients typically reimbursed? Under  
14 what program?

15 A. At that time most of them were Medicare, but you could --  
16 there were a good share of insurance patients and some privates.

17 Q. So would it depend in part on age?

18 A. Yes.

19 Q. Okay. Because not everybody is covered by Medicare, right?

20 A. There's a demo program with Preferred Care, too, so -- but  
21 basically it's by age, yes.

22 Q. Okay. And what was happening with the length of stay for  
23 Beechwood's rehab patients during the years leading up to 1998?

24 A. It was declining every year.

25 Q. Do you remember what the average length of stay was for 1998

1 for the rehab patients?

2 A. 24 days.

3 Q. Now, the reimbursement system was a per diem system, meaning  
4 so much per day; is that correct?

11:22AM 5 A. Yes.

6 Q. If we want to look, though, at the overall amount, the total  
7 amount that the Medicare system would pay to Beechwood for each  
8 rehab patient in the years leading up to 1998, was that total  
9 amount changing?

11:22AM 10 A. It was decreasing.

11 Q. And was it decreasing because the length of stay was  
12 decreasing?

13 A. Yes.

14 MR. SHEEHAN: Objection, Your Honor, leading.

11:23AM 15 THE COURT: Overruled.

16 BY MR. ROTHENBERG:

17 Q. Now, from these various cost reports, were you able to  
18 determine where Beechwood ranked among rehab programs in the State  
19 of New York in terms of reimbursement per patient?

11:23AM 20 Were you able to make that determination?

21 A. Yes. We were the fourth lowest in reimbursement.

22 Q. Was that for 1998?

23 A. Yes.

24 Q. Okay. But despite lower than average reimbursement rate for  
11:23AM 25 private pay and for Medicaid, and despite the short length of

1 stay, is it your testimony that the profit margins were increasing  
2 through the end of the 1990's?

3 MR. SHEEHAN: Objection, leading.

4 THE COURT: Overruled.

11:24AM 5 THE WITNESS: Yes, the profit margins were increasing.

6 BY MR. ROTHENBERG:

7 Q. Let's just go back to this business about PPS for one second.

8 Had the PPS system been implemented nationwide in the 1990's?

9 A. No. The PPS system came into effect probably around 1995 or  
11:24AM 10 1996, and New York State was one of five states that were called  
11 to demo projects before -- before they released it nationally.

12 Q. Was it released nationally in 1995 or 1996 or was that the  
13 time that the demo project came into being?

14 A. No, the demo project started in New York. It was released  
11:24AM 15 nationally in 1999.

16 Q. Okay. Was the Medicare reimbursement at Beechwood under the  
17 PPS system in the years 1996, 1997 and 1998?

18 A. Yes.

19 Q. I want to show you an exhibit that was introduced in evidence  
11:25AM 20 during the first part of the trial, and I'm showing you  
21 Exhibit 658A.

22 And I know we showed this to the jury before and so I  
23 won't spend a lot of time on it, but can you quickly tell the jury  
24 what 658A depicts, please?

11:25AM 25 A. Exhibit 658A is a bar chart showing OSCAR scores. And the

1 OSCAR, for the jury, is the quality -- it's -- OSCAR data is what  
2 we turn over to the surveyors when they come into the facility,  
3 and it's entered into DOH's -- actually, the federal database, but  
4 the State of New York keys it in.

11:26AM 5 This is depicting, as we talked about in the previous  
6 trial, about 21 data elements that we figured that we can -- that  
7 the outcomes would be due to how the facility delivered care.

8 And this shows these scores for the relative ranking  
9 above or below norm for the Rochester, Monroe County area  
11:26AM 10 facilities.

11 Q. Okay. 658A, all those numbers at the bottom, they talk  
12 about -- those numbers correspond to other facilities, correct?

13 A. Correct.

14 Q. And the geographic extent of those facilities is reflected in  
11:27AM 15 this exhibit is what?

16 A. It says Rochester area. Whether it's all Monroe County, I  
17 don't know.

18 Q. Did you -- aside from the data that's reflected on 658, did  
19 you obtain statewide OSCAR data for all the facilities that were  
11:27AM 20 reporting in the State of New York?

21 A. Yes, we did.

22 Q. And what mechanism did you use to get that OSCAR data?

23 A. FOIA request from the federal government.

24 Q. And I have a chart here, but do you know without looking at  
11:28AM 25 the chart where Beechwood ranked statewide in terms of these OSCAR

1 data points for the year 1998?

2 A. Yes, fourth in the state.

3 Q. Now, let's talk about Beechwood's financial performance. In  
4 the calender year 1998, do you know what the total earnings of  
11:28AM 5 Beechwood were, including amounts paid to family members?

6 A. \$1.6 million.

7 Q. And did you, Brook Chambery, did you take a salary that was  
8 in part a distribution of the facility's profits?

9 A. Yes, I did.

10 Q. And do you know what your salary was for the calender year  
11 1998?

12 A. It was over \$900,000.

13 Q. And do you know on the financial statements whether Beechwood  
14 declared a profit for the year even after paying that big salary  
11:29AM 15 to you?

16 A. Yes, it did.

17 Q. And approximately do you know what those profit figures were  
18 that are reflected on the financial statements?

19 A. Approximately \$550,000.

20 Q. Let me switch topics here and ask you about the negotiations  
21 with Preferred Care in the spring of 1999. Do you recall Molly  
22 Komor testifying in the first part of the trial, correct?

23 MR. SHEEHAN: Objection, Your Honor, relevance.

24 MR. ROTHENBERG: We're going to talk about profit margin  
11:29AM 25 here, that's the purpose of this.

1                   THE COURT: All right, with that understanding I'll  
2 overrule.

3 BY MR. ROTHENBERG:

4 Q. Do you remember her testimony?

11:30AM 5 A. Yes.

6 Q. And did you enter into actual negotiations with Preferred  
7 Care about the Subacute Care Program?

8 A. Yes, we did.

9 Q. And how were you on behalf of Beechwood when you were  
11:30AM 10 negotiating, how were you pricing subacute care for the facility?  
11 And I don't mean in exact dollars, but comparatively how were you  
12 pricing?

13 A. As competitively as I could.

14 Q. At that point in time who was the competition for subacute  
11:30AM 15 care?

16 A. Theoretically, all the nursing homes. But as she testified,  
17 we were the only ones that they were dealing with.

18 Q. Okay. But, I mean, somebody was providing this care. If  
19 somebody went to an Emergency Department, where would you get this  
11:31AM 20 care?

21 A. Oh, the way the care was being delivered is -- all this was  
22 being done in the hospitals.

23 Q. All right. And were your negotiations with Preferred Care  
24 for an exclusive or non-exclusive program?

11:31AM 25 A. Non-exclusive.

1 Q. Did that have anything to do with how you were intending to  
2 price the program?

3 A. That's why I was pricing it competitively. I wanted to be  
4 out in the lead of the rest of the facilities, and you want to do  
11:31AM 5 the best job you can at the lowest rate.

6 Q. Now, did there come a time when the rate had been reduced to  
7 writing even though there was no signed contract?

8 MR. SHEEHAN: Objection, Your Honor, its relevance.

9 And may we approach?

11:31AM 10 THE COURT: We are focusing on damages here.

11 MR. ROTHENBERG: Yes, I'm coming back to profit margin,  
12 but we can approach if counsel wishes to.

13 (WHEREUPON, a discussion was held at side bar out of the  
14 hearing of the jury.)

11:32AM 15 THE COURT: I just want to keep us focused on damages.

16 MR. ROTHENBERG: Yes, I know.

17 THE COURT: These OSCAR figures sort of, we dealt with  
18 that in the liability phase.

19 MR. ROTHENBERG: Here's the issue: Their expert in  
11:32AM 20 looking or in projecting the income in future years, their expert  
21 makes various assumptions about what's going to happen to  
22 Beechwood's margins.

23 For example, he makes the assumption that Beechwood's  
24 margins are going to decline. In fact, counsel in his opening  
11:32AM 25 said that 1998 was an anomaly.

1           So I'm going to cross him about those assumptions based  
2 on what was actually going on at Beechwood. But I have to have,  
3 you know, a foundation in the record in terms of what was going  
4 on.

11:32AM 5           So all I'm going to do with him on this topic is ask him  
6 if he made a determination where the margins would be for subacute  
7 care: Higher or lower. That's all I'm doing here.

8           MR. SHEEHAN: Your Honor, we view this as speculative.

11:33AM 9           Even their own expert doesn't rely on this. He mentions the  
10 Preferred Care agreement and possible agreement, but he does not  
11 rely on it and he doesn't take it into account in his analysis.

12           MR. ROTHENBERG: I'm not using it for my expert. I'm  
13 using it for yours.

14           MR. SHEEHAN: You can cross-examine ours if you wish.

11:33AM 15 The rest is speculative and not relevant.

16           THE COURT: Well, I think it is. I'll allow it.

17 Overruled.

18           MR. LEVINE: You said may proceed, but you said two  
19 different things. So he can continue the line of questioning?

11:33AM 20 THE COURT: Yes.

21           (WHEREUPON, side bar discussion concluded.)

22 BY MR. ROTHENBERG:

23 Q. My question, Mr. Chambery, is did you make a determination of  
24 what the price would be? I know there was no signed contract, but  
11:34AM 25 did you make a determination about what the price would be?

1                   I'm not asking you for the number, but just yes or no.

2 A. Yes.

3 Q. Okay. And did you also determine what Beechwood's profit  
4 margin would be for the Subacute Care Program should Preferred  
11:34AM 5 Care enter into the contract with Beechwood?

6 A. It would have been higher.

7 Q. Let me direct your attention to July 17 of 1999. And what  
8 happened on July 17, 1999?

9 A. The facility was closed. We were in a hearing that day. I  
11:34AM 10 got out of the hearing and walked through the empty hallways.

11 Q. When was the last day in which a resident was within the  
12 Beechwood facility?

13 A. I believe it was that day.

14 Q. What did Beechwood do -- strike that.

11:35AM 15                   Had the staff -- had any of the staff remained employed  
16 at Beechwood in the days leading up to July 17?

17 A. I think 82 of them.

18 Q. And after July 17, what happened to Beechwood's staff?

19 A. They were all let go. They had nothing to do, except for a  
11:35AM 20 about eight people that were -- we needed to help wind up  
21 activities.

22 Q. Now, had you been able as of that date, had you been granted  
23 permission to sell the facility to any third-party buyer?

24 A. No, we had not.

11:35AM 25 Q. Had any third-party buyer as of that date expressed an

1 interest in purchasing the facility?

2 A. Yes, within days.

3 Q. And if that facility -- if Beechwood -- if you had been  
4 permitted to sell the Beechwood facility to the third-party buyer  
11:36AM 5 prior to July 17, what would the purchaser have acquired at that  
6 period of time?

7 A. They would have acquired the building, the whole operation,  
8 the staff, the receivables, the payables, everything.

9 Q. Okay. So if that had happened, would it have been necessary  
11:36AM 10 for you to do all these wind-up activities?

11 A. No.

12 Q. Now, were there further discussions in the fall of 1999 about  
13 potential sale of the facility?

14 A. Yes.

11:36AM 15 Q. And in the fall of 1999, if a third-party had purchased the  
16 facility, what would the third-party have acquired at that period  
17 of time?

18 A. They would have acquired the building, the equipment and the  
19 Certificate of Need to start up again.

20 Q. And so would that -- would you still have had some wind-up  
21 activities if that had happened?

22 A. Yes.

23 Q. But would it have been necessary for you to do all of the  
24 wind-up stuff that you eventually ended up doing?

25 Q. No, I wouldn't have had to take care of an auction or take,

1 you know, to do an equipment auction or to take care of the  
2 building.

3 Q. We'll get to all those activities in one minute, but is it  
4 fair to say that if you had sold the facility even after closure,  
11:37AM 5 that the wind-up activities would have been minimized?

6 A. Yes.

7 Q. Okay. So let me ask you in terms of the things you had to do  
8 after July 17 of 1999, what things needed to be done?

9           And I'll go category by category. What, if anything,  
11:37AM 10 was done with Beechwood's suppliers or accounts payable as the  
11 accountants call it?

12 A. Well, when -- as of July 17 we had about \$200,000 worth of  
13 payables and, you know, for the vendors, for all the supplies that  
14 we were purchasing month by month, and we paid off those  
11:38AM 15 suppliers.

16 Q. What, if anything, did Beechwood have to do about its staff  
17 after letting the staff go?

18 A. The staff, we had to take care of all their accrued vacation  
19 time, sick time, 401(k) benefits, help them find new jobs,  
11:38AM 20 et cetera.

21 Q. What, if anything, did Beechwood do about its accounts  
22 receivable or money that was owed to the facility?

23 A. We went about trying to collect those. Normally they would  
24 flow in any way, but there were some that because of all the bad  
11:39AM 25 publicity and everything dragged things out, but we worked as hard

1 as we could to collect those receivables.

2 Q. What is a PRI audit?

3 A. A PRI audit is the state -- PRI's are the state assessment  
4 system, patient review instruments. And that is used for  
11:39AM 5 categorizing Medicaid patients into a certain payment category,  
6 and retroactively they will -- and it could be even years later  
7 they will do an audit of those PRI forms that we turn in.

8 Q. Did Beechwood have PRI audits that it had to deal with after  
9 July 17, 1999?

11:40AM 10 A. Yes.

11 Q. And what, if anything, happened as a result of the PRI audits  
12 after July 17 of 1999?

13 A. We paid back monies to Medicaid.

14 Q. And how or why did -- can you just explain that in general  
11:40AM 15 terms? Can you explain what happened there?

16 A. I believe the only problem in those assessments was the --  
17 who they would account for assessments would be those that are  
18 over a 30 day stay.

19 And since all our Medicare or rehab patients had a  
11:40AM 20 length of stay that was less than 30 days, they basically threw  
21 those patients out of the whole assessment calculation and said we  
22 had a, you know, typically the private patients, Medicare,  
23 everybody aggregated together for an assessment of your facility.

24 Q. What's that term called for when they count everybody  
11:40AM 25 together, this aggregate term? Is that -- do you use the term

1 "census" to describe the population of a facility?

2 A. They take the census on that day and, you know, when we  
3 submit all the PRI's for that day, they do an average for your  
4 facility.

11:41AM 5 And in this case, because a lot of them were Medicare or  
6 insurance patients that didn't even stay 30 days, they took those  
7 out of the calculations. And as a result, they said the  
8 assessment of our house was lower and we owed them money back.

9 Q. And "they" in this instance was the State of New York; is  
10 that correct?

11 A. Yes, DOH.

12 Q. And the DOH claimed that you owed them money back because  
13 your Medicare patients were being treated so quickly and  
14 efficiently that they didn't stay for 30 days?

11:41AM 15 A. Yes.

16 Q. So, in essence, Beechwood got a penalty because of that?

17 A. Yes.

18 Q. Were there any other audits of the facility after July 17,  
19 1999, other than the PRI audits?

11:42AM 20 A. Well, we had our typical financial, and the accountants would  
21 come in and do their thing.

22 Q. The accountants would come in and do their thing. Explain  
23 what you mean by that.

24 A. Well, typically the accountants come in and do an audited  
11:42AM 25 statement for Medicare because Medicaid and Medicare require it,

1 quite frankly.

2           In this case, in 1999 we didn't do that, we didn't do an  
3 audited statement, but the accountant was doing audits of the  
4 books. It wasn't a certified audit, but they were still auditing  
11:42AM 5 things.

6           But the main thing is we had a Medicare audit of 1997  
7 and 1998 and that dragged on for quite a while.

8 Q.    Okay.

9 A.    I think that wasn't settled for two, three, four years down  
11:43AM 10 the road.

11 Q.    You mentioned earlier that there was an auction of equipment,  
12 correct?

13 A.    Yes.

14 Q.    Tell the jury what happened with respect to Beechwood's  
11:43AM 15 equipment.

16 A.    When it became obvious that we would not be allowed to sell  
17 the facility, we quit paying the mortgage on the building and  
18 we --

19 Q.    Hold on, I'll get to the mortgage in five minutes. Just tell  
11:43AM 20 me about the equipment.

21 A.    The equipment was basically our equipment, we owned the  
22 equipment and we had to get rid of that. So we had an auction.

23 Q.    And what was necessary -- what needed to be done in order to  
24 have an auction? Could you invite everybody in or was there some  
11:43AM 25 preparation that needed to be done?

1 A. Every piece of equipment, every nut and bolt, you name it had  
2 to be cataloged and put together in lots for the auction.

3 Q. Okay. What are Medicare cost reports?

4 A. At the end of the year we do what's called a "cost report"  
11:44AM 5 for Medicare and Medicaid. It's simply reporting all our expenses  
6 for operations that year, whether it's used for reimbursement  
7 directly, they still use it just to keep track of what all the  
8 costs are in the state or the nation.

9 Q. Okay. And what, if anything, happened with respect to  
11:44AM 10 Medicare cost reports after July 17 of 1999?

11 A. We had a dispute over 1999 that didn't get settled until way  
12 into 2006, I believe. But -- and then there was the basic audit  
13 of -- I had never had an audit before, but since we were closed  
14 down, they came in and did an audit of 1997 and 1998, which held  
11:45AM 15 up our retroactive collection.

16 Q. "They" in that case being the federal authorities?

17 A. Yes. Well, it was their intermediary that actually does the  
18 audit.

19 Q. Okay. They hire somebody to do it on their behalf?

11:45AM 20 A. Correct.

21 Q. Okay. What, if anything, did Beechwood have to do about its  
22 medical records after closure?

23 A. Medical records, we had to go through the facility, every  
24 department and pull everybody's records together, if there were  
11:45AM 25 any physical records.

1           We had to go to a back room where we kept all the  
2 historical records, go through the ones that were old enough that  
3 we could throw them out. Catalogue the ones that we still had,  
4 index them, put them in and then we actually stored them off-site  
11:45AM 5 eventually.

6 Q.     Is there a time period for which a facility is required to  
7 keep medical records?

8 A.     Yes. I believe it was seven years.

9 Q.     Okay. And did you, in fact, do that after closure, maintain  
11:46AM 10 those medical records for that period of time?

11 A.    Yes, we put them in the off-site storage bins and any time  
12 they were needed from a PRI audit to attorneys, you know, wanting  
13 data for certain patients that had been there, we would have to go  
14 back to those storage bins and find the particular records.

11:46AM 15 Q.     So were there, in fact, occasions during the seven years when  
16 you were required to go and retrieve closed medical records?

17 A.     Yes. We also did that for the Attorney General's Office.

18 Q.     You're talking about the Medicaid fraud investigation?

19 A.     Medicaid fraud investigation, yes.

11:46AM 20 Q.     What, if anything, did you do with respect to the physical  
21 building at 900 Culver Road after closure?

22 A.     We kept two maintenance people on the payroll and we worked  
23 as hard as we could to try and sell the building. But, you know,  
24 DOH wouldn't let us go there.

11:47AM 25           But in the meantime we maintained the place, we painted

1 it, we repaved the driveways, striped it, you know, did everything  
2 we could to keep the place looking proper.

3 Q. I want to show you -- this is not yet in evidence -- so I  
4 want to show you a photograph -- actually, let me show you this  
11:47AM 5 photograph. I'm showing you what has been marked as Exhibit 698.  
6 And what is 698?

7 A. That is a picture of the building, Beechwood.

8 Q. Before or after closure?

9 A. That's after closure.

11:48AM 10 Q. And what's the condition of the parking lot -- strike that.

11 Is the parking lot depicted in the photo?

12 A. Yes, it is. And that shows the new paving and the striping.

13 Q. And now 697, what is 697?

14 A. Just another view of the building.

11:48AM 15 Q. Is this after closure?

16 A. Yes.

17 MR. ROTHENBERG: We offer 697 and 698, Your Honor.

18 MR. SHEEHAN: Your Honor, I believe 697 and 698 are  
19 already in evidence.

20 11:48AM THE COURT: They're already what?

21 MR. SHEEHAN: I believe they're already in evidence.

22 MR. ROTHENBERG: We'll check Mr. Cooman's comprehensive  
23 chart.

24 THE COURT: Otherwise any objection?

25 11:48AM MR. SHEEHAN: No, Your Honor.

1                   THE COURT: We'll check and see if they're received, but  
2 if not --

3                   MR. ROTHENBERG: They are in, I'm sorry, my mistake. So  
4 let's -- can we publish these two to the jury?

11:49AM 5 BY MR. ROTHENBERG:

6 Q. So 697, this is a picture of the exterior of the facility; is  
7 that correct?

8 A. Yes.

9 Q. And 698 is, again, the exterior of the facility, correct?

11:49AM 10 A. Yes. And showing the rehab house that we had next door.

11 It's the white house in the far right of the picture.

12 Q. And the parking lot that's depicted here, does this show the  
13 new parking lot with the new striping and stuff?

14 A. Yes.

15 Q. Now, you mentioned the mortgage earlier. Did Beechwood  
16 continue paying the mortgage after July 17 of 1999?

17 A. Yes, we did well into the next year.

18 Q. Okay. Even though there was no residents at the facility  
19 anymore?

20 A. Yes. Like I said earlier, we were hoping to sell the  
21 building, so we didn't want to lose everything we had in it. So  
22 we were paying the mortgage.

23 Q. Okay. And was Beechwood able to sell the building and recover  
24 anything from it?

25 A. No.

1 Q. Did the building -- strike that.

2 What eventually -- well, we'll catch up to that later.

3 You told us that approximately eight people stayed on after the  
4 closure in July of 1999, correct?

11:50AM 5 A. Yes.

6 Q. And for how long did those individuals keep working at the  
7 facility?

8 A. I think the last person was there -- or left in November of  
9 2000; and they just -- after they were finished with their tasks  
11:50AM 10 or oftentimes even if they weren't, I would allow them to get  
11 paid. It was basically when they found new jobs, they left.

12 Q. Okay. Who was the last person to stay on at Beechwood?

13 A. Paul Kesselring.

14 Q. When did Paul leave?

11:51AM 15 A. I think it was November of 2000.

16 Q. After Mr. Kesselring left, were there still wind-up  
17 activities that needed to be done?

18 A. A lot of them, yes.

19 Q. On whose shoulders did they fall?

11:51AM 20 A. Mine.

21 Q. Now, let me just ask you a couple questions about the  
22 termination notice because counsel brought up termination in his  
23 opening. At any time did you take any action at all in response  
24 to the termination notice that Beechwood had received?

11:51AM 25 A. I sent a letter to -- that summer, I think the first one

1 might have even been while the hearing was going on, there was  
2 another one later in August asking about recertification.

3 Q. Now, as it turns out, who controls reinstatement after  
4 termination, the feds or the state?

11:52AM 5 A. I found out that the state does.

6 Q. And to whom is a facility required to submit its request for  
7 reinstatement?

8 A. The request has to go to the Department of Health. They are  
9 the agent for the federal government.

11:52AM 10 Q. And did either the DOH or the federal HCFA take any action in  
11 response to any letter you wrote requesting reinstatement?

12 A. No.

13 Q. Now, after December of 1999 when the operating certificate  
14 was revoked, was reinstatement even possible after that date?

11:53AM 15 A. No. Without an operating certificate, you don't get  
16 recertified into Medicare or Medicaid programs.

17 Q. Okay. I want to ask you some questions about some categories  
18 of expenses Beechwood incurred after closure. You told us earlier  
19 that Beechwood paid its suppliers' accounts payable; is that  
20 correct?

21 A. Yes.

22 Q. And you told us earlier that Beechwood took care of various  
23 payroll obligations with respect to sick time, vacation time and  
24 so forth?

11:53AM 25 A. Yes.

1 Q. And the mortgage, do you remember how long Beechwood  
2 continued paying the mortgage after July of 1999?

3 A. I think it was into August of 2000.

4 Q. What, if anything, happened after Beechwood stopped paying  
11:53AM 5 the mortgage?

6 A. It went into foreclosure.

7 Q. And was the facility eventually sold at foreclosure?

8 A. Yes, in March or April of 2002.

9 Q. Did Beechwood realize any money as a result of that  
11:54AM 10 foreclosure sale?

11 A. No. We lost everything.

12 Q. Now, was there a dispute -- strike that.

13 Who guaranteed -- who, if anyone, guaranteed the  
14 mortgage on the building?

11:54AM 15 A. HUD.

16 Q. HUD is a federal agency?

17 A. Right.

18 Q. Did Beechwood have a dispute with HUD about any financial  
19 matter?

11:54AM 20 A. We had a dispute over the reserve account. We felt that it  
21 was ours and they felt they should put it against the mortgage.

22 Q. Not in excruciating detail, but as simple as possible tell  
23 the jury, please, what we're talking about here with the reserve  
24 account.

11:54AM 25 A. A reserve account was something that was -- it was required

1 by the HUD agreement, Department of Housing and Urban Development,  
2 who was insuring the mortgage. They want everybody that has such  
3 a mortgage to put a certain amount into a reserve for  
4 depreciation, or in case you don't have the money to make some  
5 repairs.

6 We were not really -- we never drew from it because we  
7 needed it. Sometimes I would argue with them that it was getting  
8 too big and we would draw it down, but at the close of the  
9 facility, I think there was \$160,000 in that account.

11:55AM 10 Q. And so there was a dispute about who had the right to get  
11 that reserve account?

12 A. Correct.

13 Q. And do you know how long that dispute -- strike that.

14 Do you know, was that dispute eventually resolved?

11:55AM 15 A. Yes.

16 Q. And do you know approximately when that was eventually  
17 resolved?

18 A. Probably in 2002 somewhere.

19 Q. Now, after Beechwood stopped paying the mortgage, but prior  
11:56AM 20 to the foreclosure, did you continue to undertake any  
21 responsibilities at all for the building?

22 A. Yes.

23 Q. And what responsibilities did Beechwood continue to undertake  
24 in that time period?

11:56AM 25 A. We had to maintain the building so that if a new operator

1 took it over, they didn't have a ruined building. So, you know,  
2 we had to -- we were constantly over there.

3 If there was a problem with the alarm system, I would be  
4 over there in the middle of the night taking care of it; cut the  
11:56AM 5 lawn. My brother helped me with a lot of that stuff. There was a  
6 lot of maintenance work to be done around there. If somebody  
7 broke a window, we had to replace the window. We had to winterize  
8 the place so that in the winter, you know, the cold temperatures  
9 didn't ruin the walls and that sort of thing.

11:56AM 10 Q. And this was undertaken by Beechwood even though you had  
11 stopped paying the mortgage and the building was in foreclosure?

12 A. Yes.

13 Q. Now, did there come a time when you vacated the facility at  
14 900 Culver Road?

11:57AM 15 A. Yes.

16 Q. And do you remember when that occurred?

17 A. We vacated it in -- I believe it was November of 2000.

18 Q. Okay. And where -- strike that.

19 At the time you vacated it, were there still financial  
11:57AM 20 records and medical records and all that kind of stuff?

21 A. Yes.

22 Q. Okay. And so did you need to find a new place to operate out  
23 of?

24 A. Yeah, we put a lot of the records in storage; we kept some of  
11:57AM 25 them ourselves; and we basically moved the whole office, you know,

1 the accounting records and whatever, patient care records we  
2 needed, and a couple -- a few desks and that sort of thing, we  
3 took the whole office environment and moved it to another office  
4 we had in Webster.

11:58AM 5 Q. Who is the "we" there? What office did "we" have in Webster?

6 A. There was an office that my mother actually owned. It was  
7 what we had used for the software business. And we purchased --  
8 she purchased that in 1980.

9 Q. And after the sale of the software business, was the software  
11:58AM 10 business still operated out of that building?

11 A. It was there until March of 2000 when the company took it out  
12 of town.

13 Q. Now, there's -- do you have a way of referring to this  
14 Webster building? What do you call that building?

11:58AM 15 A. We just called it the "software building."

16 Q. How about the -- Ebner Road is it?

17 A. Otherwise, Ebner Drive.

18 Q. Ebner Drive, okay. And did you continue to work out of the  
19 Ebner Drive facility after you left the 900 Culver Road address?

11:59AM 20 A. Yes. My brother and myself physically moved all the stuff  
21 over there and we continued to operate out of there.

22 Q. Now, did Beechwood pay Olive any rent for that building?

23 A. No. It would have been just one hand paying the other.

24 Q. Did Beechwood, however, keep track of rent that was owed to  
11:59AM 25 Olive for this period of time?

1 A. Yes. For the amount of the physical space that we were using  
2 in the building.

3 Q. Okay. Now, after July of 1999 and up until today, has  
4 Beechwood incurred legal expenses for any reason other than this  
12:00PM 5 particular lawsuit?

6 I'm not asking you about this lawsuit, but for any other  
7 reason did Beechwood incur legal expenses?

8 A. Yes.

9 Q. And for what kinds of matters did Beechwood incur legal  
12:00PM 10 expenses?

11 A. Everything from the HUD -- the depreciation reserve that we  
12 just talked about; collections on accounts receivable; disputes  
13 with Medicare over reimbursement for 1999; there was the -- the  
14 hearing back in 1999; an appeal of that hearing decision.

12:00PM 15 Q. How about the Medicaid fraud matter?

16 A. The Medicaid fraud, yes. There were numerous, numerous legal  
17 proceedings.

18 Q. Okay. I want to switch topics now and I want to --

19 THE COURT: Mr. Rothenberg, we need to take a break for  
12:01PM 20 lunch. This might be a good time.

21 MR. ROTHENBERG: Okay, Your Honor.

22 THE COURT: We're a little early here, but I think let's  
23 do it. Ladies and gentlemen, we'll break for lunch at this time.  
24 I'd like to get back in about an hour and 15 minutes if we could.  
12:01PM 25 So about 1:15, okay? 1:15.

1 MR. ROTHENBERG: Yes, Your Honor.

2 THE COURT: Ms. Rand will help you with the various  
3 restaurant locations, although I think there's another jury that's  
4 being picked today so it might be crowded down there. Let's try  
12:01PM 5 to get back at 1:15. The jury's excused. See you this afternoon.

6 (WHEREUPON, the jury was excused).

7 THE COURT: Mr. Rothenberg, in terms of our schedule,  
8 Mr. Canessa, as far as you know, will be available tomorrow?

9 MR. ROTHENBERG: Yes, yes, Your Honor. And I probably  
12:02PM 10 have another 45 minutes or so here.

11 THE COURT: I hope we can finish Mr. Chambery today then.

12 MR. ROTHENBERG: I would hope so, too.

13 THE COURT: All right, 1:15-ish.

14 MR. SHEEHAN: Yes, Your Honor.

12:02PM 15 MR. ROTHENBERG: Okay.

16 (WHEREUPON, there was a pause in the proceeding.)

17 THE COURT: I guess we have our jury and we should  
18 accommodate them, so we'll continue.

19 MR. ROTHENBERG: Yes, Your Honor. Mr. Chambery.

01:21PM 20 THE COURT: Assemble our jurors, please.

21 (WHEREUPON, the jury is present).

22 THE COURT: I guess we're ready to continue,  
23 Mr. Rothenberg.

24 MR. ROTHENBERG: Yes, Your Honor.

01:23PM 25 BY MR. ROTHENBERG:

1 Q. I was going to ask Ms. Rand for assistance in displaying a  
2 document. I'll wait one second.

3 THE CLERK: Sorry.

4 BY MR. ROTHENBERG:

01:23PM 5 Q. Well, it's not in evidence yet, so...okay, are we good?

6 Mr. Chambery, I'm showing you on your monitor there a  
7 copy of a photograph which has been marked Exhibit 731. Can you  
8 identify that, sir?

9 A. Yes. That is the front door of the nursing home.

01:23PM 10 Q. And is that -- to your knowledge, when was that photograph  
11 taken?

12 A. Just recently.

13 Q. Does that photograph 731 fairly and accurately depict the  
14 condition of the entrance to the Beechwood facility as of the  
01:24PM 15 spring of 2012?

16 A. Yes, it does.

17 MR. ROTHENBERG: Offer 731, Your Honor.

18 MR. SHEEHAN: Objection, Your Honor. This isn't relevant  
19 to damages.

01:24PM 20 THE COURT: Well, when was this boarded up?

21 THE WITNESS: It's been boarded up in various stages  
22 through the years. I think every window is now boarded up.

23 THE COURT: So this was sort of the final boarding up as  
24 of this past spring?

01:24PM 25 THE WITNESS: Well, we're not in control of it. The

1 City, I think, is taking care of it, but that's the condition at  
2 this point, yes.

3 THE COURT: But certainly the spring of 2012 it wasn't  
4 your building and you had no control over it?

01:25PM 5 THE WITNESS: Correct.

6 THE COURT: What's the relevance?

7 MR. ROTHENBERG: Depicting the current condition of it,  
8 Your Honor.

9 THE COURT: Well, I'll sustain the objection. They had  
01:25PM 10 no control over the building. If he wants to testify how it  
11 looked back in 2000 or 2001, but...

12 MR. ROTHENBERG: Okay, very well.

13 BY MR. ROTHENBERG:

14 Q. Mr. Chambery, you told us about all the wind-up activities  
01:25PM 15 that occurred in 1999 and 2000, and I'm going to do the subsequent  
16 chronology shortly. But what percentage of your time was occupied  
17 with these wind-up activities in the second half of 1999 and all  
18 of 2000?

19 A. Full time.

01:25PM 20 Q. Did there come a time when your brother Dale began helping  
21 you with any of the wind-up activities?

22 A. Yes, he began in March of 2000.

23 Q. And why did Dale start helping you out?

24 A. Because we needed the help. There was just too much for me  
01:26PM 25 or the others helping me to do by ourselves.

1 Q. Do you remember what Dale's first job was?

2 A. His first job was cataloguing all the equipment for auction.

3 Q. And did Dale continue after the auction? Did he continue to  
4 help you out with further activities at the facility?

01:26PM 5 A. Yes, from -- everything from building maintenance to helping  
6 with computer functions for the Medicaid fraud investigation to  
7 all the things we had to do for electronic -- keeping track of all  
8 the documents we were collecting after that and putting  
9 spreadsheets together, that sort of thing.

01:27PM 10 Q. Now, did Beechwood pay your brother Dale a salary for any of  
11 the time that he assisted you?

12 A. No, it did not. Couldn't afford to.

13 Q. Okay. Did you, however, keep track of monies owed to Dale?

14 A. Yes.

01:27PM 15 Q. And how did you attempt to calculate how much money was owed  
16 to Dale?

17 A. We just kept a record of what time. He did not spend  
18 full time on the project.

19 Q. Okay.

01:27PM 20 A. So we allocated his time accordingly.

21 Q. Now, have you, Brook Chambery, have you drawn a salary from  
22 Beechwood since early 1999?

23 A. No, I haven't.

24 Q. Did you draw a salary from any third-party?

01:27PM 25 A. No.

1 Q. How did you manage to support your family for the past 12, 13  
2 years?

3 A. Through savings, and I guess I would say I was fortunate  
4 enough to get some money from selling our software company and  
01:28PM 5 that -- probably those two are the main things. I guess you could  
6 call it retirement savings.

7 Q. Retirement savings. So are you saying that it was like a  
8 nest egg; is that correct?

9 A. Yes.

01:28PM 10 Q. Now, I want to change topics here, I want to ask you about  
11 the time that was involved in connection with the MFCU  
12 investigation. First of all, let's put a timeframe on this. When  
13 were the first subpoenas issued in the MFCU investigation?

14 A. I believe around the same time that Dale came on board to  
01:29PM 15 help me out. I think it was around March of 2000.

16 Q. And just in general terms -- strike that.

17 Was there one subpoena from MFCU or more than one  
18 subpoena?

19 A. There were five.

01:29PM 20 Q. And just in general terms tell the jury, please, what was the  
21 volume of documents that you had to produce in response to those  
22 various subpoenas?

23 A. Car loads. Just, for instance, Dale had an SUV -- and  
24 whether it was the first or second subpoena was for timecards and  
01:29PM 25 temporary staffing records and all that -- and they filled up his

1 whole SUV. And that was just one of them, one time.

2 What we would do is deliver them to Mr. Cooman's office  
3 and he would turn it over to the Attorney General's Office.

4 Q. And for how long did that investigation continue,

01:30PM 5 Mr. Chambery, the MFCU investigation?

6 A. Three years.

7 Q. Now, let's talk about what, if anything, you had to do  
8 yourself in connection with this particular lawsuit. We've seen a  
9 lot of exhibits in this case, correct?

01:30PM 10 A. Correct.

11 Q. And was there a procedure that you were involved with in  
12 terms of obtaining documents from the Department of Health or from  
13 other agencies?

14 A. Beginning after the hearing ended in the summer of 1999, I  
01:30PM 15 began using the Freedom of Information process to get at records  
16 both from the state and the federal government, but that process  
17 alone lasted about five and a half years.

18 Q. That "process alone" meaning what? The FOIA process?

19 A. Right.

01:31PM 20 Q. Now, was it necessary on any occasion using the FOIA system  
21 to go to court?

22 A. We had to go to court -- there were about 198 separate FOIA  
23 requests, comprised about 36 letters. And after a certain number  
24 of those, you know, we knew we weren't getting any answers at all,  
01:31PM 25 and so I think it was in 2001 we began a court action and there

1 were three court orders to turn over documents.

2 Q. Now, after this litigation got under way, did there come a  
3 time when instead of using FOIA, you used some other mechanism for  
4 obtaining documents?

01:31PM 5 A. Yes. In 2006 we began to use a discovery process, which is,  
6 you know, part of the -- we would turn to using subpoenas and  
7 other court-ordered searches for documents.

8 Q. Now, was it possible to obtain all the documents that -- let  
9 me phrase that a different way.

01:32PM 10 All the documents that we've seen here as exhibits and  
11 other documents, were they obtained all at once or in some other  
12 fashion?

13 A. All the documents we have -- the process began in the summer  
14 of 1999, and the last set of documents that we obtained was in  
01:32PM 15 2010.

16 Q. And do you have a count for -- or an approximate count for  
17 the number of pages of documents that were obtained?

18 MR. SHEEHAN: Objection, Your Honor. The amount of  
19 documents is not relevant.

01:32PM 20 THE COURT: Well --

21 MR. ROTHENBERG: I disagree, Your Honor. We've got this  
22 mitigation issue.

23 MR. SHEEHAN: I believe --

24 THE COURT: It shows the efforts Mr. Chambery -- pages  
01:33PM 25 may not equate to hours worked, but it's not totally afield. So

1 I'll allow it.

2 Any idea?

3 THE WITNESS: Roughly 45 to 50,000 documents.

4 BY MR. ROTHENBERG:

01:33PM 5 Q. Now, did you, Brook Chambery, read any of those 45 to 50,000  
6 pages of documents?

7 A. About every page.

8 Q. Now what, if anything, did you do after you read a document?

9 A. What we did is -- and I say "we" because my brother was  
01:33PM 10 helping me -- we created very elaborate spreadsheets to sort this  
11 out.

12 And I actually had other word processing documents on  
13 the side. It was a very complex process, but every piece of  
14 paper, every e-mail, whatever, had to get sorted out by author,  
01:34PM 15 recipient, who got copied in, who got blind copied, what it was  
16 about, what time of day, timecards.

17 We had things that were directly related, you know,  
18 other things that were indirectly related, like timecards and work  
19 histories. All that had to be cataloged and put together.

01:34PM 20 Q. Did somebody use a database for any of this?

21 A. We had databases of not only things from -- that may have  
22 come out of -- directly out of requests that we had made, but we  
23 also scanned all the exhibits -- I should say a lot of documents,  
24 maybe 15% of them we scanned. And those had all to be cataloged  
01:34PM 25 in.

1           We -- my brother was the one who set up the spreadsheets  
2 behind the scenes, you know, to do the automatic functions. Like  
3 we -- if we had a document number and a cell of a spreadsheet, and  
4 we clicked on that cell, up would come the document. He was the  
01:35PM 5 one that programmed all that stuff behind the scenes.

6 Q.       Okay. So you said you created spreadsheets; is that correct?

7 A.       There are many, many spreadsheets.

8 Q.       Give us an idea of the magnitude of these spreadsheets.

9 A.       That would be hard, but I'd say the two main sheets that we  
01:35PM 10 were using, there are multi-page spreadsheets and those two  
11 sheets, I call one the "proofs" and the other the "chronology."  
12 And that the chronology puts everything in date and time sequence  
13 and by author and you name it.

14           Those two spreadsheets alone probably comprise 9,000  
01:36PM 15 lines and 300,000 cells.

16 Q.       Now, I think you told me earlier that after the closing,  
17 Beechwood incurred legal expenses for various proceedings that  
18 continued on after closure, correct?

19 A.       Yes.

01:36PM 20 Q.       And in addition, there's been legal expense in connection  
21 with this particular lawsuit, correct?

22 A.       Yes.

23 Q.       And can you tell us -- and I'm not asking for dollars here,  
24 I'm asking for hours -- can you tell us the approximate number of  
01:36PM 25 lawyer hours that have been involved with all of these various

1 proceedings since the summer of 1999?

2 MR. SHEEHAN: Objection, hearsay.

3 THE COURT: Counsel approach for a minute.

4 (WHEREUPON, a discussion was held at side bar out of the  
01:37PM 5 hearing of the jury.)

6 THE COURT: Where we headed here with lawyer hours in  
7 this case? I mean --

8 MR. ROTHENBERG: I'm getting -- I'm just -- I just want a  
9 number, and then I'm going to ask him how much time he has spent  
01:37PM 10 since then. It's a reference point, that's all.

11 THE COURT: I can see the hours he spent, but, I mean,  
12 part of my charge to this jury is that, you know, attorney's fees  
13 spent on this case is not applicable.

14 MR. ROTHENBERG: I'm not asking for that. But see --

01:37PM 15 THE COURT: If you say how many hours, that's --

16 MR. ROTHENBERG: I mean, that's -- and I didn't  
17 distinguish this case. But he knows how many hours he's been  
18 billed for, he gets a number. He doesn't write down how many  
19 hours he spends.

20 So it's hard for him -- I mean, I can ask him, you know,  
21 per week, per, you know, period how much time have you spent on  
22 this. But I'm only soliciting one number, and I can tell you he's  
23 going to say over the 12 years it's been about 12,000 hours,  
24 period.

01:38PM 25 THE COURT: For him working?

1                   MR. LEVINE: He didn't keep contemporaneous notes of his  
2 own time?

3                   MR. ROTHENBERG: For the lawyers.

4                   THE COURT: I don't see the relevance of the lawyer time.  
01:38PM 5 His time, I guess it relates to the mitigation issues.

6                   MR. ROTHENBERG: I was going to relate them. Did you  
7 spend more time than the lawyers or less time than the lawyers.

8                   MR. SHEEHAN: It's hearsay, too, because it's not his  
9 direct knowledge.

01:38PM 10                  THE COURT: I think you'll have to rephrase and ask him  
11 how much time he thinks he spent monthly, weekly, yearly.

12                  (WHEREUPON, side bar discussion concluded.)

13                  THE COURT: All right. Rephrase, if you will.

14                  MR. ROTHENBERG: I will, Your Honor. Thank you.

01:38PM 15 BY MR. ROTHENBERG:

16 Q. Let focus on your own time, which is where we were going on  
17 this in any event. On a weekly basis, Mr. Chambery, on average  
18 how many hours have you spent on these various Beechwood related  
19 matters since the summer of 1999?

01:39PM 20 A. Typically 50, 60 hour weeks.

21 Q. And how often has that involved either weekend or holiday  
22 work for you personally?

23 A. Almost always.

24 Q. Have you and your wife Peg had occasion to take any vacations  
01:39PM 25 since 1999?

1 A. Two weeks and a few long weekends.

2 Q. And in terms of the total number of days, if we added all of  
3 this up, approximately how much vacation time have you taken since  
4 the summer of 1999?

01:39PM 5 A. I'd say four to five weeks.

6 Q. Now, prior to 1999 had you ever worked in any field other  
7 than the healthcare field?

8 A. No.

9 Q. Do you have a license anymore to work in the healthcare  
01:40PM 10 field?

11 A. No. My administrator's license was turned in.

12 Q. The software company, what industry did the software company  
13 serve?

14 A. Principally the nursing home market rehab, but also you can  
01:40PM 15 say healthcare in general.

16 Q. But was the work of the software company confined to the  
17 healthcare field?

18 A. Yes.

19 Q. And have you been invited to -- strike that.

01:40PM 20 I think in your direct examination back in the first  
21 phase of the trial you testified that you had spoken to  
22 professional associations regarding Beechwood's computerized  
23 medical records; is that correct?

24 A. Computerized medical records and financials. I would  
01:41PM 25 typically be out there running seminars for the college of

1 administrators and the nursing home associations.

2 Q. Have they invited you back since the summer of 1999?

3 A. No.

4 Q. Have you had occasion, Mr. Chambery, since the summer of 1999  
01:41PM 5 to Google your own name? Do you know what I mean by that?

6 A. Yes.

7 Q. Have you done that?

8 A. Yes.

9 Q. What comes up when you Google your own name?

01:41PM 10 A. The first thing that comes up is the Department of Health  
11 news releases.

12 MR. SHEEHAN: Objection.

13 THE COURT: I'm sorry?

14 MR. SHEEHAN: Objection.

01:41PM 15 THE COURT: Overruled.

16 MR. SHEEHAN: Hearsay.

17 THE COURT: Well, I think it relates, I assume, to the  
18 effect on this witness in terms of his reputation. Overruled.

19 MR. ROTHENBERG: Thank you, Your Honor.

01:41PM 20 THE WITNESS: The first thing that comes up are the news  
21 releases from 1999 that the Health Department placed on the  
22 internet talking about abusing patients and the conditions were so  
23 bad that they had to move them.

24 BY MR. ROTHENBERG:

01:42PM 25 Q. Have you ever been contacted since 1999 by anyone in the

1 healthcare field about working for their organization or working  
2 in any other facility?

3 A. No. I think you can say I was black listed.

4 Q. Let's talk about your mom Olive for a few minutes here.

01:42PM 5 After the summer of 1999 or, actually, starting in the summer of  
6 1999, did you make any personal observations about Olive's  
7 physical condition? Things you saw?

8 A. She would shake, her knees would literally shake together.

9 Q. Okay. Can you tell the jury more about that?

01:42PM 10 A. She was just distraught. She didn't want to sign her name to  
11 anything. Her knees, every time -- this went on for years. She  
12 sat in a chair and you could just watch her legs shake.

13 Q. Did you ever see that happen with Olive before the summer of  
14 1999?

01:43PM 15 A. No.

16 Q. Did you notice anything about her weight?

17 A. Yeah, she lost weight, quite a bit.

18 Q. Mr. Chambery, what percentage of your career was spent  
19 working at the Beechwood facility?

01:43PM 20 A. My whole career.

21 Q. And were there systems or procedures that you developed when  
22 you were at Beechwood that, to your knowledge, were innovative for  
23 the skilled nursing facility industry?

24 A. I would say both the financial systems and the medical  
01:44PM 25 records system were innovative.

1 Q. And this move, the decision to move into the rehab business,  
2 at the time Beechwood began that, was that common in skilled  
3 nursing facilities in the Monroe County area?

4 A. No, it was just beginning. It was just beginning nationally.

01:44PM 5 Q. And how about this discussion with Preferred Care about  
6 subacute care patients? At the time you were having those  
7 discussions, were there any other nursing homes or facilities  
8 other than hospitals treating subacute patients in this region?

9 MR. SHEEHAN: Objection.

01:44PM 10 THE WITNESS: No.

11 BY MR. ROTHENBERG:

12 Q. And to your knowledge --

13 MR. SHEEHAN: Your Honor, objection. Foundation for the  
14 last question.

01:45PM 15 THE COURT: Overruled.

16 BY MR. ROTHENBERG:

17 Q. To your knowledge, Mr. Chambery, is there anyone in Monroe  
18 County -- strike that. Not anyone.

19 Are there any nursing facilities in Monroe County today  
01:45PM 20 handling the subacute patient population that you were talking to  
21 Preferred Care about?

22 A. No.

23 Q. When Beechwood Software was sold, I think you told the jury  
24 that you realized some money as a result of that sale, correct?

01:45PM 25 A. Yes.

1 Q. Did you get anything else of value when that business was  
2 sold?

3 A. I got the right -- I maintained the rights, I should say my  
4 brother and I did, to use that software, the software that we had  
01:46PM 5 created for up to 25 facilities.

6 Q. And why did you retain that? Why was that -- strike that.

7 Did you negotiate in that transaction to retain those  
8 licenses?

9 A. Yes, I did.

01:46PM 10 Q. Why did you do that?

11 A. Because it was my intention to expand. We had such a good  
12 operations model going, it was a very unique thing and we intended  
13 to expand that in New York and outside of New York.

14 Q. And were you able to do that?

15 A. No. The DOH ended that in 1999.

16 Q. To your knowledge, Mr. Chambery, what kind of a reputation in  
17 the healthcare industry did you enjoy after 1999?

18 MR. SHEEHAN: Objection, hearsay.

19 THE COURT: Well, the witness needs to be specific as

01:46PM 20 to --

21 THE WITNESS: Well, my reputation was destroyed. There  
22 was no reputation.

23 THE COURT: Well, do you have any specific instances  
24 where you inquired or people advised you about your reputation?

01:47PM 25 THE WITNESS: No, I don't.

1                   THE COURT: Okay. Well, I'll sustain the objection then.

2 BY MR. ROTHENBERG:

3 Q. Have you operated Beechwood Restorative Care at any time  
4 since July 17 of 1999?

01:47PM 5 A. No.

6 Q. Have you opened any other healthcare facilities since July of  
7 1999?

8 A. No.

9 Q. Have you hired anybody to work at any facility you own since  
01:47PM 10 July 17 of 1999?

11 A. No.

12 Q. Have you brought any further innovations to the healthcare  
13 industry since July of 1999?

14                   MR. SHEEHAN: Objection, Your Honor, further innovations.

01:48PM 15 THE COURT: I'm sorry?

16                   MR. SHEEHAN: Further innovations is suggestive and  
17 vague.

18                   THE COURT: Overruled.

19                   THE WITNESS: No.

01:48PM 20                   MR. ROTHENBERG: That's all I have, Mr. Chambery. Thank  
21 you very much.

22                   THE COURT: Let's have the jury step out for a second. I  
23 need to see counsel.

24                   MR. ROTHENBERG: Yes, Your Honor.

01:48PM 25                   (WHEREUPON, the jury is not present).

1                   THE COURT: I'll retrieve these documents if necessary,  
2 but some reason I lost my voice, but the Court a week or so ago  
3 ruled on some of the *in limine* motions; and also asked plaintiff  
4 to provide copies of Mr. Chambery's income tax returns for 1989 to  
01:49PM 5 2011.

6                   There was a subpoena that was directed at Mr. Chambery  
7 for those items. We had argument a week or so ago. And I think  
8 the Court at that time indicated that after years of discovery,  
9 this seemed to be very late in coming.

01:49PM 10                  And I think in our discussion, Mr. Sheehan, the request  
11 was to, I guess, determine from the tax returns if, in fact,  
12 Mr. Chambery had received any wages, income, et cetera.

13                  Am I correct that that's --

14                  MR. SHEEHAN: It was beyond just wages and salary income,  
01:50PM 15 Your Honor. It was also things like day trading, managing rental  
16 properties, consulting through an S corporation, things that  
17 wouldn't necessarily appear on a Schedule C or on a W-2.

18                  It was just a way to verify that Mr. Chambery hadn't  
19 been engaged in some other activity during this time.

01:50PM 20                  THE COURT: Well, I have received the tax returns as  
21 indicated. I've reviewed them. They show nothing on line 7,  
22 which is where income, wages, et cetera, no indications of any  
23 1040 applications or -- I'm sorry, 1099 forms that were submitted.

24                  They show, you know, income from investments and  
01:51PM 25 dividends, but nothing on the tax returns that indicate any income

1 from any other source. So that's based on my review.

2 I thought the thrust was primarily to verify or check  
3 whether Mr. Chambery had received any income. Mr. Cooman, I  
4 think, also pointed out in argument that Mr. Chambery was deposed  
01:51PM 5 and there was no inquiry made at that time about his tax returns,  
6 although there may have been some questions about it.

7 So I've reviewed over ten years of tax returns and  
8 there's nothing on them that indicate any other income other than  
9 investment income, sale of stocks, interest, dividends. So I see  
01:52PM 10 no basis to turn them over. There's nothing in there.

11 I think we agreed -- or at least whether Mr. Chambery  
12 had income from investments and so forth I don't think is a valid  
13 consideration for diminishing the sums he might recover should the  
14 jury find he's entitled to recover for lost wages.

01:52PM 15 Agree?

16 MR. SHEEHAN: Well, there is an issue. Mr. Chambery did  
17 put his net worth at issue when he testified about paying down his  
18 nest egg, his retirement fund.

19 Now, to the extent that he does have other income that  
01:52PM 20 he's relying on, he's created the impression that he's gone  
21 through a hardship, that paying down the retirement has visions of  
22 well, we won't be able to live for the future to it.

23 And so I would ask the Court for leave to ask  
24 Mr. Chambery about his other assets at this point and other income  
01:53PM 25 derived from it to eliminate that appearance of hardship.

1                   THE COURT: Well, Mr. Cooman, any --

2                   MR. COOMAN: We strongly disagree, Your Honor, that would  
3 be highly prejudicial and unnecessary. Mr. Chambery's net worth  
4 is not an issue in the case.

01:53PM 5                   We simply had to go into the issue of how did he sustain  
6 himself because the allegation here is he somehow should have gone  
7 out and worked, and we needed to explain what's been going on for  
8 a decade.

9                   THE COURT: Well, mitigation is certainly an issue. The  
01:53PM 10 jury may well have to determine that, but I don't see,  
11 Mr. Sheehan, that he's opened up an entire review of his personal  
12 assets, finances, stock and so forth.

13                   The issue is did he work or not, and was it reasonable  
14 for him not to? And I don't think the jury fairly should consider  
01:54PM 15 the fact that he may have other investment monies as any kind of a  
16 factor that they can consider as to whether or not they should  
17 award him money for lost wages.

18                   MR. SHEEHAN: But, Your Honor, our argument would be that  
19 they should consider it to the extent that there's the impression  
01:54PM 20 he's paid down his retirement and won't be able to live in the  
21 future.

22                   MR. COOMAN: There's no request for that as an item of  
23 damage, Your Honor. There's no claim for future wages or anything  
24 other than those specific categories of damage that we have talked  
01:54PM 25 about before.

1                   THE COURT: Wages from 1999 to 2012?

2                   MR. COOMAN: Correct.

3                   THE COURT: But not future?

4                   MR. COOMAN: That's correct. It's only non-economic loss  
01:54PM 5 as to reputation and that sort of thing.

6                   THE COURT: All right. I don't see it, Mr. Sheehan. So  
7 I don't think the modest reference that Mr. Chambery made here, I  
8 don't think opens the door to a full exploration of his personal  
9 wealth. I don't think it's something that's before this jury.

01:55PM 10                  The jury should focus on the loss and the damages and  
11 not other matters. For instance, they shouldn't focus on your  
12 clients. It's just focused on the plaintiff and what the  
13 plaintiff suffered and lost because of the activities here.

14                  So whether he's a pauper or millionaire, I don't think  
01:55PM 15 effects his entitlement should the jury find entitlement for the  
16 wages that he used to take out of the business, but no longer does  
17 so.

18                  So I just wanted to let you know what I had found  
19 relative to the *in camera* examination of the tax returns. I think  
01:55PM 20 I've stated that.

21                  MR. COOMAN: Thank you, Your Honor.

22                  THE COURT: Otherwise -- and I know I did indicate that I  
23 made a couple of rulings and I was going to advise you the basis  
24 for those reasons. I don't want to delay matters now to do that,  
01:56PM 25 but they will either be put on the record or I'll do a writing.

1                   Otherwise, you have some cross I assume, Mr. Sheehan?

2 MR. SHEEHAN: Yes, Your Honor.

3 THE COURT: All right, take a few minutes then.

4 | MR. SHEEHAN: Yes, Your Honor.

01:56PM 5 THE COURT: Okay, about ten minutes.

6 MR. ROTHENBERG: Yes, Your Honor.

7 (WHEREUPON, there was a pause in the proceeding.)

8 THE COURT: Bring in the jury, please.

(WHEREUPON, the jury is present).

02:13PM 10 THE COURT: All right, Mr. Sheehan, if you have some  
11 questions, you may proceed.

12 MR. SHEEHAN: Thank you, Your Honor.

## CROSS-EXAMINATION

14 BY MR. SHEEHAN:

02:15PM 15 Q. Good afternoon, Mr. Chambery.

16 A. Good afternoon.

17 Q. I want to ask you a couple of just quick questions. First,  
18 you testified earlier about Exhibit 668, which I think I would  
19 like to show.

02:15PM 20 I think it's in evidence, Your Honor. I think we  
21 admitted it previously.

THE COURT: Do you want it shown?

23 MR. SHEEHAN: I've got it on. Is it not coming through?

24 | BY MR. SHEEHAN:

02:16PM 25 Q. Do you remember testifying about this document, Mr. Chambery?

1 A. Yes.

2 Q. Is the data in this document self-reported by the nursing  
3 facilities?

4 A. Yes, it is.

02:16PM 5 Q. Thank you. I would also like to ask you, you spoke earlier  
6 in your testimony about a \$1.6 million number for profit.

7 Do you recall that?

8 A. Yes.

02:16PM 9 Q. That number is not on Beechwood's financial statements, is  
10 it?

11 A. The numbers that make it up are on the financial statement,  
12 yes.

13 Q. Understood. But the \$1.6 million number that -- actually,  
14 the \$1.6 million number you discussed, that doesn't appear  
02:16PM 15 anywhere on any of your financial statements?

16 A. No, it does not.

17 Q. That's a number your expert created, correct?

18 A. It's a standard EBITDA formula.

19 Q. Your expert came up with that number?

02:17PM 20 A. It's also on the exhibit we just showed. It's a standard  
21 formula.

22 Q. But you didn't come up --

23 A. It's not the net profit, no.

24 Q. You didn't come up with that number, did you? I'm trying to  
02:17PM 25 get you to -- your expert is the one who derived that number? Who

1 came up with that number?

2 A. Correct, but the data we just looked at has the same thing.

3 Q. Understood. I believe you were talking about subacute care  
4 at the end, and is doing subacute care related to rehabilitation?

02:17PM 5 A. Subacute care might have some rehabilitation in it, but  
6 that's not what we were pricing it -- that's not what we were  
7 doing with Preferred Care.

8 Q. Well, let's talk about what Beechwood was transitioning to.

9 Beechwood was transitioning to 82 beds of rehabilitation; is that  
02:17PM 10 correct?

11 A. We would have, yes. We had completed one unit, we would have  
12 been going on to do another unit.

13 Q. There were 41 rehab beds and -- 41 rehabilitation beds in  
14 1999; is that right?

02:18PM 15 A. Yes.

16 Q. Okay. Is there -- are there any other facilities in Monroe  
17 County that are currently doing rehabilitation? Nursing  
18 facilities I mean.

19 A. Yes.

02:18PM 20 Q. And isn't it true that in 1999 you expected more nursing  
21 facilities to go into rehabilitation?

22 A. Yes, it's a growing field.

23 Q. The trend generally was moving towards rehabilitation; isn't  
24 that correct?

02:18PM 25 A. Correct.

1 Q. And there was nothing keeping your competitors, your -- the  
2 other nursing homes that were your competitors from entering the  
3 rehabilitation field, was there?

4 A. No.

02:18PM 5 Q. And once those nursing facilities entered the rehabilitation  
6 field, they would have been direct competitors with Beechwood for  
7 that rehabilitation business; isn't that right?

8 A. They could have tried to.

9 Q. I believe you talked about selling the equipment. Do you  
02:19PM 10 recall that?

11 A. Yes.

12 Q. As part of -- that's part of the wrap-up of the Beechwood  
13 facility; is that right?

14 A. Yes.

02:19PM 15 Q. When did the sale of equipment occur?

16 A. I cannot remember. Let's see, it would have -- would have  
17 been after we had stopped paying the mortgage, which was August of  
18 2000. So sometime after that. It might have been October or  
19 November of that year.

02:19PM 20 Q. Approximately October or November of 2000?

21 A. Correct.

22 Q. Okay. What did you sell? What equipment was sold?

23 A. Everything that wasn't tied to the building.

24 Q. So would that include the beds?

02:20PM 25 A. The beds were not -- the beds did not go at auction. Nobody

1 bought them.

2 Q. The rehabilitation equipment?

3 A. Rehab equipment, all the turning mattresses, wheelchairs,  
4 parts for wheelchairs. You name it, it was all in the auction,  
02:20PM 5 forks and spoons.

6 Q. What were the bigger pieces of equipment?

7 A. We've got lifts, automated lifts, you know, that take  
8 somebody out of bed. Turning mattresses, those are bigger pieces  
9 of equipment.

02:20PM 10 Q. You sold turning mattresses as part of the salvage effort?

11 A. Yes.

12 Q. And you sold lifts?

13 A. Yes.

14 Q. Were there multiple lifts and multiple turning mattresses?

02:21PM 15 A. Yes.

16 Q. Were there any other large pieces of equipment that were  
17 sold?

18 A. I don't think -- no, you're talking about movable equipment,  
19 you know, they're not huge items.

02:21PM 20 Q. Besides --

21 A. Lawn mowers, you know, tractors, you name it.

22 Q. Tractors? Did you say tractors?

23 A. Yeah, we had a tractor to mow and to remove snow.

24 Q. How big was the tractor?

02:21PM 25 A. Just your typical garden tractor.

1 Q. To whom did you sell all this equipment?

2 A. To whoever bid on it.

3 Q. So was it different people?

4 A. Yes, it was a big auction. There was a lot of people there.

02:21PM 5 Q. And the total sum amount you got for all of the equipment for  
6 Beechwood was \$43,000?

7 A. Yes. Pennies on the dollar.

8 Q. You discussed a lot of litigation activity that you were  
9 engaged in. Are you aware of litigation activity back to  
02:22PM 10 January 1999?

11 A. Yes.

12 Q. And the reason I ask is you're claiming pre-closure amounts  
13 for legal fees back to January 1999; isn't that right?

14 A. Oh, January of 1999?

02:22PM 15 Q. 1999, yes, sir.

16 A. I have no idea what that might have been, if there were any  
17 legal fees in January of 1999.

18 Q. Are you aware that you're claiming as an element of your  
19 damages legal fees that go back to January of 1999?

02:22PM 20 A. In that -- from January 1999 to the closing date, in that  
21 period, those were due to the hearing.

22 Q. So you are aware of that? You're aware of the damages  
23 component?

24 A. For the part of the hearing that is before the closing date,  
02:23PM 25 yes. The hearing began June 23. We closed July 17th. So the

1 hearing -- the hearing -- the legal fees for that hearing are in  
2 that period.

3 Q. That's in June of 1999?

4 A. Correct.

02:23PM 5 Q. I'm talking about legal fees from January of 1999. Are you  
6 aware you're seeking those fees as an element of your damages?

7 A. That's all part of that period, January to July of --  
8 January 1 to July 17 is the reporting period.

9 Q. So you are seeking -- just answer the question. You are  
02:23PM 10 seeking compensation for, say, legal fees in January, the month of  
11 January 1999?

12 A. No.

13 Q. No?

14 A. No.

02:23PM 15 Q. How about February of 1999?

16 A. Not that -- I do not recall any legal actions back then.

17 Q. March of 1999?

18 A. I don't believe so.

19 Q. How about April of 1999?

02:24PM 20 A. I cannot tell you when the attorneys first got involved.

21 Q. So as far as you're aware sitting here, the legal fees that  
22 you're seeking as part of your damages start in June of 1999?

23 A. No. It would have been before then, before the hearing took  
24 place. The attorneys were still in gear, they were on board  
02:24PM 25 fighting the various actions the Department of Health was taking.

1 Q. So there wouldn't be anything before April 15th, 1999, for  
2 example?

3 A. I doubt there was anything in that period.

4 Q. I think you testified that Dale Chambery previously worked --  
02:24PM 5 Dale Chambery is your brother, right?

6 A. Yes.

7 Q. He previously worked for Beechwood?

8 A. Dale principally worked for Beechwood Software.

9 Q. Beechwood Software, that's the company you sold?

02:25PM 10 A. Correct.

11 Q. Did he do any work for Beechwood Nursing Home? For the  
12 nursing facility, I mean?

13 A. Yes, he did some work.

14 Q. What did he do?

02:25PM 15 A. He was pretty much our computer consultant.

16 Q. Do you know when he started? Did he start in 1994?

17 A. Did he start?

18 Q. Doing computer consulting for Beechwood?

19 A. No. Before that.

02:25PM 20 Q. And he was paid for that? For the computer consulting?

21 A. Yeah, he was.

22 Q. You paid him a salary?

23 A. No, he was not on the books on a salary basis.

24 Q. How did you pay him?

02:25PM 25 A. He would get a 1099.

1 Q. Do you recall the amounts that were paid to Dale Chambery?

2 A. Not off the top of my head, no.

3 Q. Would \$35,000 be at about the right amount as far as you can  
4 remember?

02:26PM 5 A. For what year?

6 Q. I'm thinking 1995 -- 1994, 1995, somewhere in that range?

7 A. Could be.

8 Q. How about \$195,000?

9 A. Yes, I remember that figure.

02:26PM 10 Q. What's the \$195,000 figure?

11 A. That was not -- that was one of those family type things that  
12 we were talking about earlier.

13 Q. I'm sorry?

14 A. That's not for computer consulting.

02:26PM 15 Q. Was any of that amount for computer consulting?

16 A. Might have been in there, yes.

17 Q. Do you know how much was in there for computer consulting?

18 A. No, I don't.

19 Q. When you say it was "one of those family things," what do you  
02:26PM 20 mean?

21 A. He was getting paid maybe more than the market salary because  
22 he was a family member.

23 Q. So could it have been something like -- instead of \$35,000,  
24 he got \$195,000?

02:27PM 25 A. Yes.

1 Q. After Beechwood closed, Dale worked with you to help wind up  
2 the business?

3 A. Yes.

4 Q. But he wasn't paid for that?

02:27PM 5 A. Correct.

6 Q. Was Dale paid for any work by Beechwood after it closed?

7 A. No.

8 Q. Do you know if Dale worked anywhere else between 1999 and  
9 2012?

02:27PM 10 A. Yes, he was working for the company we sold to, Shared  
11 Medical Systems, SMS.

12 Q. And when did Mr. Dale Chambery, when did he work for Shared  
13 Medical Systems?

14 A. From March of -- or February 1998, when we sold the company,  
02:27PM 15 until March of 2000.

16 Q. After March of 2000 did Mr. Dale Chambery work anywhere else?

17 A. No.

18 Q. So your brother hasn't worked anywhere since March of 2000?

19 A. Correct.

02:28PM 20 Q. Mr. Chambery, you have an MBA; is that right?

21 A. Yes.

22 Q. Do you feel proficient in accounting?

23 A. Yes.

24 Q. And you're proficient with computers? You developed a  
02:28PM 25 software company; is that right?

1 A. Computers is not my proficiency. It's my brother's  
2 proficiency.

3 Q. What was your part with the software company?

4 A. I did the systems design, both financials and patient care.

02:28PM 5 Q. So you have some expertise with systems design?

6 A. Correct.

7 Q. And you sold that software company to Shared Medical Systems?

8 A. Yes.

9 Q. Did you have a non-compete as part of that sale?

02:28PM 10 A. I did not, no.

11 Q. Did Dale?

12 A. His might have had a -- was it a non-compete? There was  
13 probably something in there about non-compete, yes.

14 Q. When was the last paycheck that you received from Beechwood?

02:29PM 15 A. Would be December of 1998 -- no, take that back. There might  
16 have been some minor stuff on payroll in the spring of 1999.

17 Q. And since Beechwood closed, you worked up on -- you've worked  
18 on wind-up activities and litigation related activities; is that  
19 right?

02:29PM 20 A. Yes.

21 Q. Anything else?

22 A. Nope.

23 Q. And you were engaged in these litigation related activities  
24 full time; is that right?

02:29PM 25 A. More than full time, yes.

1 Q. For the last 13 years?

2 A. Yes.

3 Q. You also hired two law firms to work on this litigation;  
4 isn't that right?

02:29PM 5 A. Yes.

6 Q. And that would be Mr. Cooman's law firm and Mr. Rothenberg's  
7 law firm; is that right?

8 A. And others.

9 Q. On this particular litigation?

02:30PM 10 A. There's been others.

11 Q. How many other law firms?

12 MR. ROTHENBERG: Objection, relevance. I thought we  
13 weren't going to get into this? Wasn't that the objection we had?

14 MR. SHEEHAN: I'm not clear what the objection is, Your  
02:30PM 15 Honor.

16 MR. ROTHENBERG: The objection is relevance.

17 MR. SHEEHAN: Relevance. This goes to his activities and  
18 the necessity of them, Your Honor.

19 THE COURT: You can ask him about what he did. He's  
02:30PM 20 indicated there were two law firms that you mentioned and perhaps  
21 some others. I think we'll leave it at that.

22 MR. SHEEHAN: Yes, Your Honor.

23 BY MR. SHEEHAN:

24 Q. At some point you began working -- began doing the wind-up  
02:30PM 25 activities and the litigation related activities at 945 Ebner; is

1 that right?

2 A. Yes.

3 Q. I'm sorry, when was that approximately?

4 A. Probably August, September of 2000.

02:30PM 5 Q. And when you went to 945 Ebner, you brought all the medical  
6 records and a lot of other paper from Beechwood; is that right?

7 A. Not all the medical records. We put a lot of the medical  
8 records in storage.

9 Q. So what medical records -- excuse me. What documents, what  
02:31PM 10 files or other material did you bring to 945 Ebner from Beechwood?

11 A. 975 Ebner.

12 Q. I'm sorry, 975 Ebner.

13 A. We would have taken the medical records that we -- that were  
14 involved in the hearing, and maybe some that were involved from  
02:31PM 15 the Attorney General's fraud investigation.

16 Q. So it was just litigation related material that you brought?

17 A. For medical records, yes.

18 Q. Was there any other material that you brought from  
19 Beechwood's files?

20 A. Most of it went into storage. It was only stuff that we were  
21 using for litigation other than what we were -- documents we were  
22 getting out of Freedom of Information, et cetera.

23 Q. So primarily you used 975 Ebner as an office in which to do  
24 work for this litigation?

02:32PM 25 A. And other wind-up activities that dragged on for years. What

1 we were talking about earlier, the Medicare audits and PRI audits,  
2 et cetera. My brother also helped out on that.

3 Q. Do you have any time sheets for the work that you did these  
4 last 13 years?

02:32PM 5 A. No.

6 Q. Did you keep track of what you were doing at all?

7 A. No.

8 Q. The last 13 years did you do any consulting work?

9 A. No.

02:32PM 10 Q. Did you do any work with nursing homes?

11 A. No.

12 Q. Did you do any work with software?

13 A. No.

14 Q. Other than the wind-up activities and the litigation related  
02:32PM 15 activities, did you do any work with your brother Dale?

16 A. No.

17 Q. Did you manage any rental properties?

18 A. No.

19 Q. Did you manage any investments?

02:33PM 20 A. I have investments, yes.

21 Q. Did you spend any time managing them?

22 A. No.

23 MR. ROTHENBERG: Objection. Your Honor already ruled on  
24 this.

02:33PM 25 THE COURT: Overruled. He said he did no work. These

1 are his own investments.

2 BY MR. SHEEHAN:

3 Q. Did you try to get consulting work?

4 A. No, I did not.

02:33PM 5 Q. Did you try to get any work?

6 A. No, I did not.

7 Q. There's no physical reason that you couldn't work, is there?

8 A. No.

9 Q. I would like to show you an exhibit that I've marked as 1109  
02:33PM 10 for identification.

11 Your Honor, may I approach?

12 THE COURT: Sure.

13 BY MR. SHEEHAN:

14 Q. Exhibit 1109 is a two-page document, Mr. Chambery. Have you  
02:34PM 15 seen these two pages before?

16 A. I think they're both related, yes. I've seen these.

17 Q. Did you create these two pages?

18 A. No.

19 Q. Do you know who created these two pages?  
02:35PM 20 A. Yes. Two people that work for ElderWood.

21 Q. You gave these two pages to Mr. Canessa as part of the  
22 process of creating his report; is that right?

23 A. Yes.

24 Q. Mr. Chambery, I'd like to show you what's been marked as  
02:35PM 25 Exhibit 1110 for identification.

1 THE COURT: What is it?

2 MR. SHEEHAN: Exhibit 1110, it's a three page document,  
3 Your Honor. Three ones and a zero.

4 THE COURT: Oh, three ones, one one one. Okay.

02:35PM 5 THE WITNESS: Yes.

6 BY MR. SHEEHAN:

7 Q. Mr. Chambery, Exhibit 1110 is a three-page document. Have  
8 you seen these three pages before?

9 A. Yes.

02:36PM 10 Q. Did you create these three pages?

11 A. Yes.

12 Q. And at the bottom there is an identifying number FE 484 and  
13 it continues through FE 486; is that right?

14 A. Yes.

02:36PM 15 Q. You provided these three pages to your experts?

16 A. Yes.

17 Q. Mr. Chambery, on January 1, 1999, you acquired a 9% interest  
18 in Beechwood from your mother; is that right?

19 A. February of 1999.

02:37PM 20 Q. But it's listed as January 1, 1999 on the financials, but --

21 A. That the accounting period, yes.

22 Q. Okay. And that was about four months before the first April  
23 survey at issue; is that right?

24 A. Yes. Kind of a bad investment.

02:37PM 25 Q. And you paid \$95,000 to your mother for that 9% share of

1 Beechwood; is that right?

2 A. Yes.

3 Q. Was there a valuation prepared supporting that transfer?

4 A. No.

02:37PM 5 Q. How was that figure \$95,000 for 9% arrived at?

6 A. I have no idea anymore.

7 Q. Is it your opinion that the \$95,000 that you paid for 9% of  
8 Beechwood represented a fair market value for that 9%?

9 A. No.

02:38PM 10 Q. Are you aware that the IRS requires this type of transfer of  
11 a partnership interest to be valued at fair market value?

12 A. I sat down with my accountant and I remember going through  
13 that with her.

14 Q. Well, we can get to that. If you would, Mr. Chambery,

02:38PM 15 please, are you aware that the IRS requires a transfer of a  
16 partnership interest to be made at fair market value?

17 MR. ROTHENBERG: Okay, objection. Assumes facts not in  
18 evidence, Your Honor.

19 THE COURT: Overruled. You may inquire. Do you know  
02:38PM 20 that to be the case or not?

21 THE WITNESS: I don't know what all the IRS rules are on  
22 that.

23 BY MR. SHEEHAN:

24 Q. Are you aware that if the transaction is not done at fair  
02:38PM 25 market value or is done at a discount, then the transfer

1 constitutes a gift?

2 A. Yes.

3 Q. Was any gift return prepared as part of this transaction?

4 A. No.

02:39PM 5 Q. Did anyone file a gift tax return for this transaction?

6 A. No.

7 Q. So sitting here today, we have no evidence of how or why  
8 perhaps 9% interest was worth only \$95,000?

9 A. This wasn't a fair market transaction. This was a non-arm's  
02:39PM 10 length transaction between family members for a minor part of the  
11 nursing home that didn't have establishment with the State of New  
12 York.

13 Q. Are you aware that \$95,000 for 9% of Beechwood translates to  
14 a value for Beechwood of approximately \$1.1 million?

02:39PM 15 A. You cannot make that assumption, no.

16 Q. Today sitting here in court, it's your opinion that Beechwood  
17 was worth \$17 million?

18 A. It was worth more than that.

19 Q. Are you aware that if your value of \$17 million for Beechwood  
02:40PM 20 is accurate, then the taxable gift would have occurred for the  
21 difference?

22 MR. ROTHENBERG: Objection. No foundation, Your Honor.

23 THE COURT: Sustained.

24 MR. SHEEHAN: I have no further questions, Your Honor.

02:40PM 25 THE COURT: Okay.

1 MR. ROTHENBERG: I just have a couple minutes. Counsel,  
2 can I please see 1110?

3 REDIRECT EXAMINATION

4 BY MR. ROTHENBERG:

02:41PM 5 Q. Counsel asked you about 1110, which I have in front of you.

6 A. Mm-hmm.

7 Q. Do you see 1110?

8 A. Yes.

9 Q. There's a little notation at the upper right-hand corner.

02:41PM 10 What's that little notation says?

11 A. It says propertyissues.wps. It was a word processing  
12 document.

13 Q. And just in general, in the most general terms, what's this  
14 exhibit about?

02:41PM 15 A. I was making notes about building valuation in the midst  
16 of -- there's more pages that go with that exhibit that are  
17 dealing with depreciation issues and Medicaid issues.

18 Q. Okay. But does this have to do with the business of Beechwood  
19 or the property of Beechwood?

02:41PM 20 A. Property reimbursement.

21 MR. ROTHENBERG: That's all I have.

22 THE COURT: Thank you. We're through with Mr. Chambery  
23 then?

24 MR. ROTHENBERG: Nothing further, Your Honor.

02:42PM 25 MR. SHEEHAN: Nothing further, Your Honor.

1 THE COURT: You may step down.

2 (WHEREUPON, the witness was excused).

3 THE COURT: Let me see counsel, if I could?

4 (WHEREUPON, a discussion was held at side bar out of the  
02:42PM 5 hearing of the jury.)

6 THE COURT: As far as you know, is your guy ready for  
7 tomorrow?

8 MR. ROTHENBERG: Yes.

9 THE COURT: What kind of surgery?

02:42PM 10 MR. COOMAN: Went in the emergency room Thursday night  
11 for a kidney stone, had to go in Friday morning -- under general  
12 anesthesia on Friday.

13 THE COURT: Okay. So 9 o'clock?

14 MR. ROTHENBERG: Yes.

02:42PM 15 THE COURT: Okay.

16 MR. COOMAN: Actually at 9:00, Your Honor, the subpoena's  
17 been issued for John Darling simply to identify that one piece of  
18 e-mail, so he'll be five minutes or --

19 MR. SHEEHAN: We have an objection on that pending, Your  
02:42PM 20 Honor.

21 THE COURT: Well, we can talk about it when the jury  
22 goes.

23 (WHEREUPON, side bar discussion concluded.)

24 THE COURT: All right, ladies and gentlemen, that's going  
02:43PM 25 to conclude our work for today. The next witness will not be

1 available until tomorrow morning, so we'll recess tonight. Next  
2 witness will be the expert Mr. Canessa, who will be here at  
3 9 o'clock-ish tomorrow. So we'll excuse you tomorrow until  
4 9 o'clock. We expect to have a lunch break. I'm not sure if  
02:43PM 5 Mr. Canessa will take the whole day or not, but a good part of it  
6 probably.

7 So thank you for your attention. Please remember the  
8 admonitions I gave you in the prior part of the trial not to  
9 discuss the case, to keep an open mind. I especially admonish you  
02:43PM 10 not to read any newspaper accounts or other media accounts of the  
11 trial and, of course, not to do any online searches or any other  
12 media explorations. Anything you need to decide this case, you'll  
13 hear right here.

14 So keep up your steadfast attention to duty in this part  
02:44PM 15 of the case and we'll see you tomorrow at 9 o'clock. The jury can  
16 be excused.

17 (WHEREUPON, the jury was excused).

18 THE COURT: Mr. Canessa will be your final witness,  
19 except for Mr. Darling?

02:44PM 20 MR. COOMAN: Yes.

21 THE COURT: What's your collective opinion as to whether  
22 we will need the whole day with Mr. Canessa or --

23 MR. COOMAN: Your Honor, it appears my direct is two  
24 hours, plus or minus a couple of minutes.

02:45PM 25 THE COURT: Okay. I'm wondering if we need defense

1       witnesses available. I guess they're here?

2                    MR. SHEEHAN: They are here, Your Honor. I think I  
3       probably am going to take about -- right now it's around two  
4       hours. It could get shorter depending on, obviously, on what  
02:45PM 5       Mr. Canessa says.

6                    THE COURT: Well, I think we've got to plow ahead and be  
7       prepared for defense witnesses.

8                    MR. SHEEHAN: Okay, Your Honor. Alternatively, if you  
9       wanted to stop early tomorrow, we could do that because I don't  
02:45PM 10      know that -- I think Ms. Rutecki is going to be somewhere along  
11     the lines, the same length of time as Mr. Canessa. But it's  
12     whatever Your Honor's preference is.

13                  THE COURT: I mean, if we finish Mr. Canessa mid to late  
14     afternoon, we might break. But, you know, the jury's here, I'd  
02:45PM 15     like to maximize their time. We lose a juror after this weekend.

16                  MR. SHEEHAN: I think we're going to finish pretty --  
17     maybe Thursday at the latest.

18                  THE COURT: It's up to you. So have a defense witness  
19     available.

02:46PM 20                  MR. SHEEHAN: Yes, Your Honor.

21                  THE COURT: All right, you want to talk about this  
22     Darling issue?

23                  MR. COOMAN: Your Honor --

24                  THE COURT: I don't have the exhibit with me, but I  
02:46PM 25     understand --

1 MR. SHEEHAN: I have one copy of it, Your Honor.

2 MR. COOMAN: I think we can put it up on display.

3 MR. SHEEHAN: It's true, it's Exhibit 567. Is this  
4 your --

02:46PM 5 MR. COOMAN: Am I using yours, Bernie?

6 MR. SHEEHAN: Yeah, pull up 567.

7 THE COURT: I can go get mine.

8 MR. COOMAN: It's up now I think, Your Honor, or will  
9 be.

02:47PM 10 As we, I think, indicated in our exchange of e-mails  
11 that the Court was copied in on, Exhibit 567 is an e-mail of John  
12 Darling to the Public Affairs Group person Kristine Smith on July  
13 12, 1999.

14 This came up during the first part of the trial, and the  
02:47PM 15 Court denied its admission on the grounds that we couldn't  
16 authenticate it because we had neither Mr. Darling nor Ms. Smith  
17 here, and they are listed as the only author and recipient.

18 So we've subpoenaed Mr. Darling.

19 THE COURT: Who are these people?

02:47PM 20 MR. COOMAN: Mr. Darling was an attorney for the New York  
21 State Department of Health; and Kristine Smith was one of the  
22 people in leadership at the Public Affairs Group, the media people  
23 affiliated with the Department of Health.

24 And Mr. Darling's prepared to authenticate the e-mail as  
02:47PM 25 his own. Its relevance is clear as it relates to the reputation

1 damage to Beechwood which was part of the ordinary foreseeable and  
2 intended consequences of the actions that the defendants took.

3                   The Court may remember that Mr. Rubin and others were  
4 intimately involved in working with Ms. Smith and others at the  
02:48PM 5 Public Affairs Group to ensure that there would be plenty of  
6 adverse publicity in the form of news releases, website  
7 publications, interviews, et cetera and obviously the e-mail  
8 speaks for itself.

9                   THE COURT: Who is the Joe that's referenced?

02:48PM 10                  MR. COOMAN: Joe Rohm. You may recall Joe Rohm is one of  
11 the Public Affairs Group personnel who was copied in on various  
12 e-mails, maybe most noticeably where Ms. Leeds said, "Joe, this is  
13 the only thing we don't want public." I think it was a May of  
14 1999 e-mail exchange.

02:49PM 15                  THE COURT: This was July 12th it looks like?

16                  MR. COOMAN: Correct.

17                  THE COURT: Well, I think in Mr. Sheehan's exchange in  
18 this he indicated difficulty seeing how this was connected to a  
19 defendant.

02:49PM 20                  MR. COOMAN: That's what he said, Your Honor, but given  
21 the causation principles that are in play here, which is that  
22 these defendants are liable for any foreseeable consequence of  
23 their actions, clearly from the testimony and proof we've had, one  
24 of the foreseeable -- in fact, intended consequences was adverse  
02:49PM 25 publicity about Beechwood and the Chamberys.

1           And so whether something adverse happened from another  
2 Department of Health employee or from HCFA or anybody else, if  
3 that was in the chain of events that occurred by reason of what  
4 these defendants did, then that is entirely relevant for the jury  
02:49PM 5 and this is sort of the classic example of that, where the people  
6 within the Department of Health who were specifically enlisted to  
7 do the reputational damage did so and acknowledged that they were  
8 quite successful in, quote, sullying the good name of the  
9 Chamberys and Beechwood.

02:50PM 10           MR. SHEEHAN: Your Honor, our primary problem with this  
11 exhibit is that it's hearsay. I mean, the e-mail alone is  
12 hearsay, but this is at least two levels of hearsay.

13           Mr. Darling is talking about comments that were made at  
14 a standard of proof hearing and he's implying that the comments  
02:50PM 15 that were made importend that Joe had done a fine job.

16           And as far as I can tell, Mr. Darling is talking about  
17 what Mr. Cooman said at the administrative law judge hearing. I  
18 don't know that for sure. We wouldn't know until we get  
19 Mr. Darling on the stand, but that's what really seems to be going  
02:50PM 20 on here, he's just relaying what Mr. Cooman said at the hearing.

21           THE COURT: You said this was made at a standard of proof  
22 hearing?

23           MR. SHEEHAN: Your Honor, at this time the hearing in  
24 front of ALJ Zylberberg was going on.

02:51PM 25           THE COURT: Okay.

1                   MR. SHEEHAN: Among the arguments they made, I think it's  
2 on July 9, there was a standard of proof argument made to the  
3 Court back and forth. As part of that argument it looks like  
4 Mr. Cooman made some comments, and that's what I think is the  
02:51PM 5 subject matter of this e-mail is that Mr. Darling is relaying and  
6 describing what Mr. Cooman said at the hearing.

7                   THE COURT: Standard of proof, you mean proffer of proof?

8                   MR. SHEEHAN: I think it was the burden of proof. They  
9 use standard of proof there. I think they were talking about  
02:51PM 10 burden of proof at the hearing, but the subject matter is not  
11 relevant. It's that these are not the thoughts of John Darling.  
12 John Darling is conveying what he believes to be the thoughts of  
13 somebody else.

14                   THE COURT: What's the offer of proof as to Mr. Darling?

02:52PM 15 Is he just going to tell the circumstances of this e-mail or what  
16 he meant by it?

17                   MR. COOMAN: I guess we don't even think that's  
18 necessary. He will simply identify he used e-mail in the ordinary  
19 course of his business, and he sent this e-mail to a member of the  
02:52PM 20 Public Affairs Group expressing his observation at how successful  
21 the Department had been with respect to their sullyling effort s.

22                   MR. SHEEHAN: It's our argument that's not his opinion,  
23 Your Honor. That's his interpretation of someone else's opinion.

24                   And, like I said, lately I went back trying to figure  
02:52PM 25 out exactly where it came from. It's a guess. I have not talked

1 to Mr. Darling, but I did note I looked to the hearing transcript  
2 on July 9th and they had a standard of proof, burden of proof  
3 hearing where Mr. Cooman discussed Joe Rohm. So that's why I  
4 think it's a reasonable assumption, certainly one worth meritizing,  
02:52PM 5 discussing this out of the presence of the jury with Mr. Darling  
6 if we get that far.

7 THE COURT: Is Mr. Darling local?

8 MR. COOMAN: Yes, he is. He was with the Department  
9 of Health for a number of years and now works for a firm  
02:53PM 10 that's out on, ironically, Sully's Trail in Pittsford, a law firm  
11 there.

12 THE COURT: Well, I'm not prepared to rule. Maybe we  
13 have to talk to Mr. Darling outside the presence of the jury.  
14 That's the best I can do.

02:53PM 15 MR. COOMAN: Very well.

16 THE COURT: We can do that first thing if you want or  
17 hold him until later. He's subpoenaed at 9:00?

18 MR. COOMAN: He is subpoenaed for 9:00 so...

19 THE COURT: Let's do that then. Think about it over the  
02:53PM 20 evening, take a look at your submissions and, otherwise, I guess  
21 we'll be ready with Mr. Canessa.

22 Have you checked with him? Is he feeling all right so  
23 he can --

24 MR. COOMAN: Yes.

02:54PM 25 THE COURT: -- be here tomorrow?

1 MR. COOMAN: Yes, yes.

2 THE COURT: They say sometimes cross-examination is like  
3 passing a kidney stone, but I guess he has firsthand experience.  
4 I don't mean to make light of it.

02:54PM 5 MR. LEVINE: Judge, before you recess I wanted to bring  
6 something to your attention that came out during the testimony,  
7 something for you to think about which will come up tomorrow and  
8 then again in the closing charges.

9 Mr. Chambery's asking for compensation for the time he  
02:54PM 10 spent working on the litigation. And I respectfully submit that  
11 under 1988, you're not entitled to your own personal time to be  
12 compensated. You're entitled to your attorney's fees.

13 What they're doing by this type of evidence is getting  
14 through the back door what they can't get through the front door.  
02:54PM 15 He testified that there was a winding up period, that's one thing.  
16 But the time he spent working on this litigation would not be  
17 otherwise compensable under 1988.

18 And I'd ask the Court to think about the idea that it's  
19 not compensable as a measure of damages, and the example I would  
02:55PM 20 give you is if a pro se came in and said, "I've spent 20 hours a  
21 week on this litigation for the past year, and although I know I  
22 can't collect it under 1988, that's what I was doing for the year  
23 leading up to the litigation, I want to be -- I would like to be  
24 compensated for it."

02:55PM 25 It would not be something that could be compensable.

1 Therefore, with regards to expert testimony on that subject, as  
2 well as your charge, whether you give it or not, we would ask the  
3 Court to review the law on 1988, as well as compensable damages  
4 outside of 1988.

02:55PM 5 MR. ROTHENBERG: Judge, I'm sorry. We're not asking for  
6 that at all.

7 THE COURT: I didn't think plaintiff was. I thought the  
8 testimony really related to what it was that Mr. Chambery was  
9 doing over the past 12 years in relation to the mitigation  
02:56PM 10 argument.

11 MR. ROTHENBERG: Exactly. That's exactly correct.

12 MR. LEVINE: As long as they're not seeking damages, I  
13 mean, if he's getting X dollars per year in damages and it's  
14 supposed to have a compensable component for the litigation work,  
02:56PM 15 that would not be compensable.

16 MR. ROTHENBERG: We're not seeking that, and the expert  
17 won't testify to that.

18 MR. LEVINE: That's easy. Thank you, Judge.

19 THE COURT: See you tomorrow.

02:56PM 20 MR. ROTHENBERG: Yes, Your Honor. Thank you.

21 (WHEREUPON, the proceedings adjourned at 2:54 p.m.)

22 \* \* \*

23

24

25

1

CERTIFICATE OF REPORTER

2

3           In accordance with 28, U.S.C., 753(b), I certify that  
4 these original notes are a true and correct record of proceedings  
5 in the United States District Court for the Western District of  
6 New York before the Honorable David G. Larimer on August 20, 2012.

7

8 S/ Christi A. Macri

9 Christi A. Macri, FAPR-RMR-CRR-CRI  
Official Court Reporter

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25